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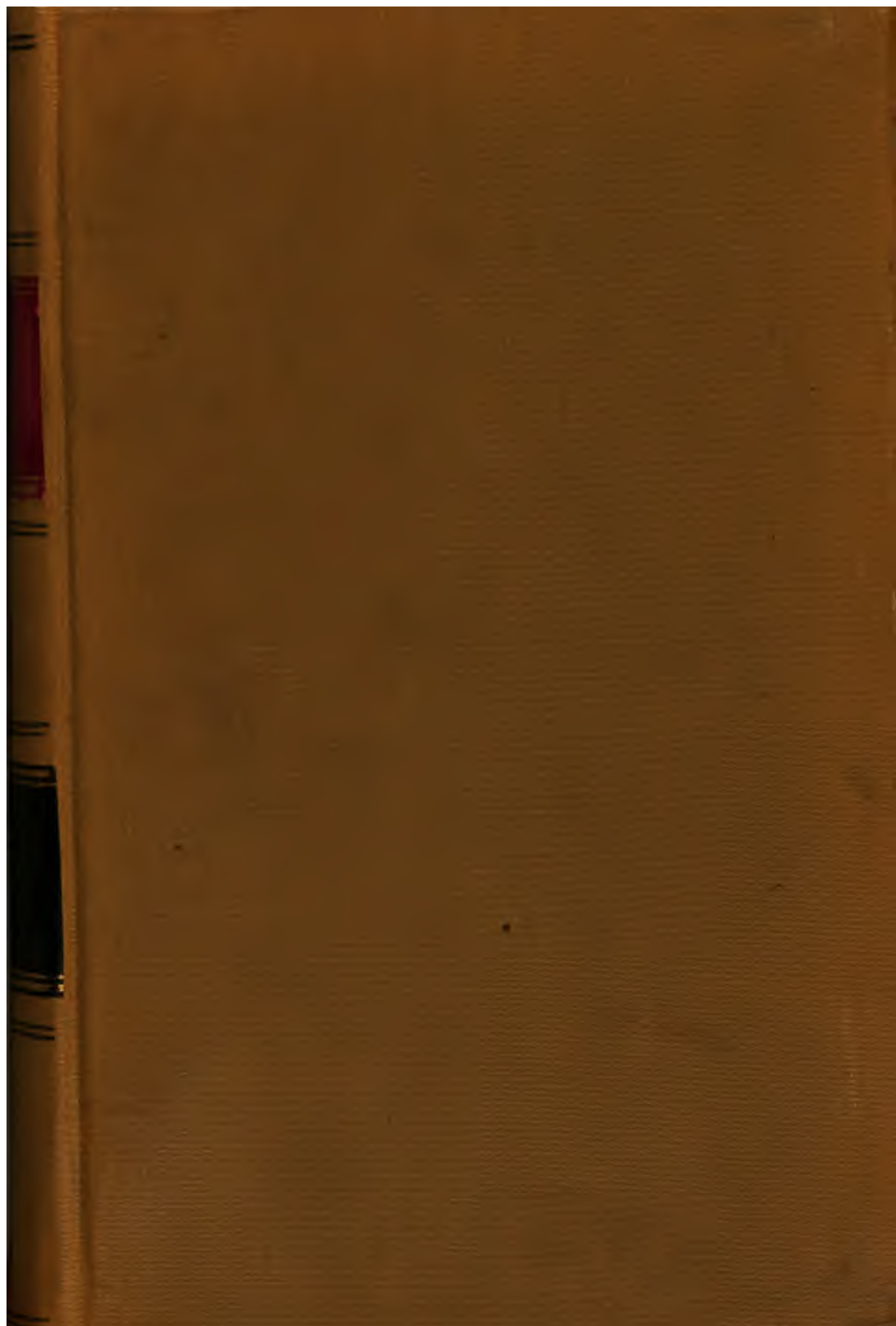
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CONTRACTUAL LIMITATIONS,

INCLUDING

TRADE STRIKES AND CONSPIRACIES

AND

CORPORATE TRUSTS AND COMBINATIONS.

BY

CHARLES A. RAY, LL. D.,

OF THE NEW YORK BAR,

EX-CHIEF JUSTICE OF THE SUPREME COURT OF INDIANA.

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DEDICATION.

Individuality irresistibly exerts itself, during the process of crystallization of the widely gathered human elements into an organized community. The simmering, seething mixture is precipitated into solidity and forms about the fixed metal of individual character. The moral, religious and mental tone of a community is attuned in harmonious accord with the perfected rhythm of individual development.

It was most fortunate as contributing to its present proud position, that in the formation of the State, now enclosing within its bounds, and near its Capitol City, the central point of population of our Union, such men there lived as Dr. Isaac Coe, James M. Ray, Ebenezer Sharpe, James Blake, Nicholas McCarty, Calvin Fletcher, Morris Morris, Rev. William A. Holliday, Austin W. Morris, Daniel Yandes and Samuel Merrill.

I record only the names of those who have made their lives object lessons within my own remembrance, and have passed in person from view, but yet live honored in loving memory. Under their influence, both in private and public transactions, moral considerations were recognized as "limitations" even upon the right of contract; and public policy was ever what best served private virtue and public honor. These good men lived not for themselves, but that others might rightly live. United and loved in life, now crowned in our memory, they rest together peacefully from their labors upon "Crown Hill," overlooking the city they loved.

Let not the limit of their lives, contract the circle of their influence.

CHARLES ANDREW RAY.

PREFACE.

While the law recognizes that commercial prosperity requires that every one of full age and reasonable discretion should have almost unlimited freedom in entering into contracts, and that all engagements thus freely and fairly entered into should be held sacred and enforceable in law, and all equitable rights growing out of such engagements should be given full effect; yet there are limitations upon this right to contract which the security of society and the protection of individual rights render it imperative that the law making power should impose, and that courts should render effective.

It is true that public policy is uncertain and fluctuating—changing with the enlarged demands of commerce and the usages of trade—and that even in morals, the test is not uniform, the innocent wager of the ancient common law, becoming the gambling contract of to-day; and the illegal sale of property to which no title exists, becoming, in turn, the reliance of both producer and manufacturer; the latter indeed purchasing futures in cotton and in grain, that he may enter into contract for the delivery of the product at fixed and remunerative prices, thus creating for the producer a present market for future delivery.

But it still stands true, that whatever contract conflicts with the moral sentiment of the times, or contravenes any established existing interest of society, social, commercial or political, is void, as against public policy. By this test must all Contracts, Trade Agreements and Strikes, and all Corporate or Partnership Trusts and Combinations be judged. It is the purpose of this work to bring them all to this judgment.

CHARLES A. RAY.

Law offices of DUDLEY, MICHENER & RAY, }
40 Wall St., New York, March 1st, 1892. }

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CONTRACTUAL LIMITATIONS.

CHAPTER I.

LIMITATIONS UPON THE RIGHT TO CONTRACT.

- § 1. *Duty to Avoid Invading Interests Cherished by the Law.*
- § 2. *What are Contracts which Invade such Interests.*
 - a. *Consideration Essential, Illegal in Part, Moral and Immoral.*
 - b. *Good and Equitable Consideration.*
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 - f. *Voluntary Service or Promise ; Existing Obligations.*
 - g. *Wager Policies on Life.*
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- § 3. *Courts, in Matter of Contract, will Protect the Public.*

§ 1. **Duty to Avoid Invading Interests Cherished by the Law.**—While at common law the right of everyone, not belonging to a class specially disqualified — as infants, married women, or lunatics—to enter into a contract upon a sufficient consideration, is recognized, yet all persons are forbidden to enter into any contract which is contrary to “the policy of the law” or the welfare of the State. This is giving practical effect to the rule that everyone in exercising a right must have regard to the effect of such exercise upon his neighbor. But while the rule in torts is only held to require that a man must see that his neighbor does not suffer from his negligent exercise of his right (Ray, Neg. Pers. 8), in the matter of contracts, it declares that the right to make them does not include the right to enter into any engagement which contemplates injury to the rights of another.¹ An agreement to

¹*Bartle v. Nutt*, 29 U. S. 4 Pet. 184, 7 L. ed. 825; *Gordon v. Howden*, 12 Clark & F. 287.

accomplish a purpose in itself not unlawful, by means of a violation of a contract with a third party, or a fraud upon him, or a breach of trust, or a trespass against his person or property, is illegal.¹

So, also, all contracts invading any one of the interests which the law cherishes, though not indictable and not prohibited by statute, are against public policy and void.²

The common law will not permit individuals to legally place themselves in a position by contract where they are required either to do or not to do a particular thing, when the thing to be done or omitted is in any degree injurious to the public.³

A trade-mark liable to deceive the public will not be a protection to its owner;⁴ or one discriminating between union and non-union labor.⁵

So a contract to pay an unlicensed physician for his services as a physician, when a statute prohibits him from practicing, is void

¹ *Woodruff v. Wentworth*, 133 Mass. 309; *Guernsey v. Cook*, 120 Mass. 501; *Rice v. Wood*, 118 Mass. 133; *Fuller v. Dams*, 18 Pick. 472; *Spaulding v. Preston*, 21 Vt. 9; *Foots v. Emerson*, 10 Vt. 338; *Oscanyon v. Winchester Arms Co.*, 103 U. S. 261, 26 L. ed. 539; *Forbes v. McDonald*, 54 Cal. 96; *Jackson v. Ludeling*, 88 U. S. 21 Wall. 616, 23 L. ed. 492; *Noel v. Drake*, 28 Kan. 265; *Nichols v. Ruggles*, 3 Day, 145; *Reg. v. Rowlands*, 17 Q. B. 671; *Reg. v. Warburton*, L. R. 1 C.C. 274; *Reg. v. Aspinall*, L. R. 2 Q. B. Div. 57; *Poplett v. Stoddale*, 1 Ryan & M. 337; *Shep. Touch*, 370.

² *Oscanyon v. Winchester Arms Co.*, 103 U. S. 261, 26 L. ed. 539; *Fuller v. Dams*, 18 Pick. 472; *Bestor v. Wathen*, 60 Ill. 138; *Ayer v. Hutchins*, 4 Mass. 372; *Linss v. Hesing*, 44 Ill. 113; *Hamilton v. Scull*, 26 Mo. 165; *Fenton v. Ham*, 35 Mo. 409; *Harwood v. Knapper*, 50 Mo. 456; *Church v. Muir*, 33 N. J. L. 318; *Bradford v. Beyer*, 17 Ohio St. 383; *Norris v. Norris*, 9 Dana, 318; *Kribben v. Haycraft*, 26 Mo. 396; *Wright v. Rindskopf*, 48 Wis. 343.

³ *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 23 W. Va. 617; *Western U. Teleg. Co. v. American U. Teleg. Co.*, 65 Ga. 160; *Haslehurst v. Savannah, G. & N. A. R. Co.*, 43 Ga. 13; *Raymond v. Leavitt*, 46 Mich. 447; *Colles v. Trow City D. Co.*, 11 Hun, 397; *Watson v. Harlem & N. Y. Nav. Co.*, 52 How. Pr. 348; *Faulds v. Yates*, 57 Ill. 416; *Falls' App.*, 91 Pa. 534.

⁴ *Manhattan Medicine Co. v. Wood*, 106 U. S. 218, 27 L. ed. 706; *Palmer v. Harris*, 60 Pa. 156; *Connell v. Reed*, 128 Mass. 477; *Buckland v. Rice*, 40 Ohio St. 526; *Siegert v. Abbott*, 61 Md. 276; *Cleveland, O. C. & I. R. Co. v. Olmer*, 9 L. R. A. 754, 126 Ind. 348; *Kirkpatrick v. Clark*, 8 L. R. A. 511, 132 Ill. 342.

⁵ *McVey v. Brendel*, 13 L. R. A. 377. See, on subject of trade-marks, *New York & R. Cement Co. v. Coplay Cement Co.*, 10 L. R. A. 333, 44 Fed. Rep. 277; *Alff v. Radam*, 9 L. R. A. 145, 77 Tex. 530; *Weener v. Brayton*, 8 L. R. A. 640, 152 Mass. 101; *Gato v. El Modelo Cigar Mfg. Co.*, 6 L. R. A. 323, 25 Fla. 386; *Laughman v. Piper*, 5 L. R. A. 599, 128 Pa. 1; *Cigar Makers Prot. Union v. Conhaim*, 8 L. R. A. 125, 40 Minn. 243; *Rumford Chemical Works v. Mulh.*, 1 L. R. A. 44, 35 Fed. Rep. 524; and notes to the cases.

in its inception, as imperiling the public health.¹ A contract by which a telephone company agrees to give a telegraph company the exclusive use for a term of years of the telephone for receiving and transmitting telegraph messages is void as limiting public use, and therefore against public policy.² A man's contract to give another the first right to purchase the interest of his deceased wife's estate in school lands, as soon as administration is had upon the estate, is contrary to public policy and void, where he had no power to bind the estate.³

Where property of large value, both real and personal, is incumbered with mortgages or other liens to an amount something like its value, so that there remains in the owner but an equity of redemption of trifling value; and a creditor at execution sale, or otherwise, buys at a small price such equity, with a view to redemption from the liens, a court of equity will lend its aid to put him in a position where he may safely redeem; but where such purchase is purely speculative, simply in fact to trade upon the chances of successfully attacking transfers of large property, made for the benefit of creditors, and with the view of depriving them of the benefits of such transfers, it is a case where equity, true to its ideas of substantial justice, refuses to be bound by the letter of legal procedure, or to lend its aid to a mere speculative purchase which threatens injury and ruin to a large body of honest creditors, who have trusted for the payment of their debts to the legal validity of proceedings theretofore taken.⁴

Nothing can call a court of equity into activity but conscience and good faith toward the public and individuals, and reasonable diligence. Where these are wanting, the court is passive, and does nothing.⁵

¹*Pucket v. Alexander*, 3 L. R. A. 43, 103 N. C. 95; *Gardner v. Tatum*, 81 Cal. 370.

²*State v. Delaware & A. Teleg. & Teleph. Co.* 47 Fed. Rep. 633.

³*Specht v. Collins*, — Tex. —, 16 S. W. Rep. 984.

⁴*Jencks v. Quidnick Co.* 180 U. S. 457, 84 L. ed. 200. See *Townshend v. Goodfellow*, 3 L. R. A. 789, 40 Minn. 312.

⁵*Brown v. Buena Vista County*, 95 U. S. 157, 160, 24 L. ed. 422; *Speidel v. Henrici*, 120 U. S. 877-887, 30 L. ed. 718-720; *Aldridge v. Muirhead*, 101 U. S. 397, 25 L. ed. 1013; *Muirhead v. Aldridge*, 14 Nat. Bankr. Reg. 249; *Codman v. Rogers*, 10 Pick. 112; Angell, Lim. (6th ed.) § 96; Buswell, Lim. & Adv. Poss. § 159; Wood, Lim. § 118; *Sebring v. Sebring*, 43 N. J. Eq. 59; Pom. Eq. Jur. §§ 418, 419.

If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to;¹ for one who has been led into a contract upon which he has received something of value cannot ignore the contract, however induced, and proceed as if the relations of the parties were wholly unaffected thereby, and cannot while retaining its benefits and thus affirming the contract, treat it as though it did not exist.²

One kind of unfairness which stays the interference of the court arises where the enforcement of the contract would be injurious to third parties.³

A contract obtained under circumstances which are not fair and honest cannot be enforced in equity.⁴

Thus, where an illiterate man signs a writing which has been falsely read to him, he cannot be compelled to execute it.⁵

A sale will be set aside at the petition of a vendor not guilty of laches under the circumstances in which he acted, who has been induced to sell, at an inadequate price, property at a great distance from his residence, and of the value of which he was ignorant, by the false representations as to such value of a purchaser who has secured his trust and confidence for this purpose and who is fully informed as to such value and acquainted with the property, but does not disclose the facts respecting it.⁶

Nor can there be any contract enforceable in a court, where a physical act of concurrence therein has been coerced through duress or imprisonment; and a threat followed by fear of its execu-

¹*Hume v. United States*, 182 U. S. 406, 32 L. ed. 393.

²*Home Ins. Co. v. McRichards*, 121 Ind. 121; *Hume v. United States*, 182 U. S. 406, 32 L. ed. 393.

³*Fry*, Specific Perf. § 245.

⁴*Foley v. Greene*, 1 New Eng. Rep. 17, 14 R. I. 618; *Kelly v. Kendall*, 6 West. Rep. 544, 118 Ill. 650; *Fry*, Specific Perf. § 241; *Dement v. Bonham*, 26 Ill. 158; *Mitchell v. King*, 77 Ill. 466; *Tamm v. Lavallo*, 92 Ill. 263; *Kelley v. Sheldon*, 8 Wis. 258; *Minor v. Medbury*, 6 Wis. 295; *Smith v. Mariner*, 5 Wis. 551; *Reed v. Jones*, 8 Wis. 392; *Wells v. Millet*, 23 Wis. 64; *McClellan v. Scott*, 24 Wis. 81; *Mortlock v. Buller*, 10 Ves. Jr. 292; *Stone v. Pratt*, 25 Ill. 25.

⁵*Green v. North Buffalo Twp.* 56 Pa. 110; *Schuylkill County v. Copley*, 67 Pa. 386. This is also the doctrine of *Thoroughgood's Case*.

⁶*Parry v. Parry*, — Wis. —, 48 N. W. Rep. 654.

tion, constitutes duress sufficient to invalidate a contract made under its influence.¹

So if a person be in pecuniary distress so that he would be disposed to make an undue sacrifice, and advantage is taken of his condition to obtain from him a contract for an insufficient consideration, he will be relieved therefrom.²

And a settlement and release obtained by threats and menaces from a creditor of a weak mind is invalid.³

Where the direct purpose of the engagement is in itself unlawful, the contract is incapable of enforcement;⁴ and a contract whose invalidity is caused by its stipulating for the commission of an act forbidden by law at the time when it is to be done, cannot be ratified, even after a change in the law has rendered the doing of the act not unlawful.⁵

A court will not sit to take an accounting between two robbers.⁶

A contract between an attorney and a non-professional, to procure the former employment by a litigant, in consideration of a part of whatever remuneration the attorney receives for his services from the litigant, is contrary to public policy and void.⁷

Nor can an attorney contract for a monthly compensation, to defend all cases brought against his employers, engaged in the illegal sale of liquor, for future violations of law.⁸

¹*Turley v. Edwards* (Mo. App.) 1 West. Rep. 450; *Brundage v. Port Chester*, 3 Cent. Rep. 642, 102 N. Y. 494; *Foley v. Greene*, 1 New Eng. Rep. 17, 14 R. I. 618.

²*Buford v. Louisville & N. R. Co.* 82 Ky. 286.

³*Parmentier v. Pater*, 18 Or. 121.

⁴*Hanauer v. Doane*, 79 U. S. 12 Wall. 342, 346, 20 L. ed. 489; *Kirkpatrick v. Clark*, 8 L. R. A. 511, 132 Ill. 342; *Milner v. Patton*, 49 Ala. 423; *Lewis v. Latham*, 74 N. C. 283; *Harvey v. Merrill*, 5 L. R. A. 200, 150 Mass. 1; *Milford v. Milford Water Co.* 3 L. R. A. 122, 124 Pa. 610; *Tatum v. Kelly*, 25 Ark. 209; *Roquemore v. Alloway*, 38 Tex. 461; *Cannan v. Bryce*, 3 Barn. & Ald. 179; *Cutler v. Welsh*, 48 N. H. 497; *White v. Buss*, 3 Cush. 448; *Critchler v. Holloway*, 64 N. C. 526; *Ralston v. Boady*, 20 Ga. 449; *Sprott v. United States*, 87 U. S. 20 Wall. 459, 22 L. ed. 371; *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581; *Walker v. United States*, 106 U. S. 413; *Wilson v. Rankin*, L. R. 1 Q. B. 163; *Johnson v. Union M. & F. Ins. Co.* 127 Mass. 555.

⁵*Handy v. Globe Pub. Co.* 4 L. R. A. 466, 41 Minn. 188.

⁶*Everel v. Williams*, 2 Pothier, Obl. (Evans's ed.) p. 3, note a; *Spaulding v. Preston*, 21 Vt. 9; *Shep. Touch.* 370; *Sykes v. Beadon*, L. R. 11 Ch. Div. 195.

⁷*Alpers v. Hunt*, 9 L. R. A. 483, 86 Cal. 78.

⁸*Bowman v. Phillips*, 41 Kan. 364.

§ 2. **What are Contracts which Invade such Interests.**—Contracts violating, or whatever, even in spirit, is in violation of a statute, or obstructs justice, or is against good morals (including contracts injuriously affecting the marriage relation and wagering contracts), or is in restraint of liberty of commerce, or of natural or of legal right, comes within this prohibition and is void.¹

The surrender of letters and telegrams of the maker of a note, and of a protested check given in payment of a gambling debt, constitutes an insufficient consideration for a note.²

All contracts against the policy of the law and such as contravene sound morality are, on these grounds, void. They are *contra bonos mores*, and therefore void.³

a. Consideration Essential; Illegal in Part; Moral and Immoral.—An entire contract, which is founded upon a consideration in part illegal is void, and incapable of confirmation.⁴

The consideration alleged must be lawful, and not in its nature, because of some tainting or vitiating quality in it, void.⁵

Agreements entered into with a view to future cohabitation

¹*Cleveland, O. & C. & I. R. Co. v. Olesser*, 9 L. R. A. 754, 126 Ind. 348; *Harvey v. Merrill*, 5 L. R. A. 300, 150 Mass. 1; *McDermot v. Castlane*, Hard. 18; *Pingrey v. Washbourne*, 1 Aik. 264; *Craig v. Missouri*, 24 U. S. 4 Pet. 431, 7 L. ed. 910; *Mitchell v. Smith*, 4 Yeates, 84; *Bushell v. Beavan*, 1 Bing. N. C. 110; *Ousack v. White*, 3 Mill. L. 284; *Kirkpatrick v. Clark*, 8 L. R. A. 511, 132 Ill. 342; *Peck v. Burr*, 10 N. Y. 294; *Hathaway v. Moran*, 44 Me. 67; *White v. Buss*, 3 Cush. 448; *Dillon v. Allen*, 46 Iowa, 299; *Bemis v. Baker*, 1 Kan. 226; *Ray v. Mackin*, 100 Ill. 246; *Martin v. Bartow Iron Works*, 35 Ga. 320; *Peterson v. Christensen*, 26 Minn. 377; *North v. Nelson*, 28 Ala. 511; *Odineal v. Barry*, 24 Miss. 9; *Ferguson v. Norman*, 5 Bing. N. C. 76; *Cannan v. Bryce*, 3 Barn. & Ad. 179; *Gale v. Leckie*, 2 Stark. 107; *Bishop v. Palmer*, 6 New Eng. Rep. 129, 146 Mass. 469; *Smith v. Arnold*, 106 Mass. 269; *Pierce v. Beane*, 61 Pa. 415; *Burkholder v. Beeton*, 65 Pa. 496; *Durgin v. Dyer*, 68 Me. 143; *Bank of United States v. Owens*, 27 U. S. 2 Pet. 527, 7 L. ed. 508; *Irwin v. Williar*, 110 U. S. 498, 510, 28 L. ed. 225, 230; *Love v. Harvey*, 114 Mass. 80; *Winchester v. Nutter*, 52 N. H. 507; *Rice v. Gist*, 1 Strobb. L. 82; *Edgell v. McLaughlin*, 6 Whart. 176.

²*Hollingsworth v. Moulton*, 53 Hun. 91.

³*Sharp v. Farmer*, 4 Dev. & B. L. 123; *Blythe v. Lovingsgood*, 24 N. C. 20; *Ingram v. Ingram*, 49 N. C. 188; *King v. Winants*, 71 N. C. 469; *Williams v. Carr*, 80 N. C. 295; *Griffin v. Hasty*, 94 N. C. 438; *Burbage v. Windley*, 12 L. R. A. 409, 108 N. C. 357.

⁴*Pettit v. Pettit*, 33 Ala. 288; *Handy v. Globe Pub. Co.* 4 L. R. A. 466, 41 Minn. 188.

⁵*Moore v. Hobbs*, 79 N. C. 535; *Burnet v. Bisco*, 4 Johns. 235; 1 Chitty, Pl. 294.

and prostitution are illegal and void, as being against public morality.¹

A warrant of attorney, given to induce a plaintiff to live in prostitution with the defendant, is void, and will be decreed to be given up.²

A woman living by agreement with a man as his wife cannot, after his marriage, recover in assumpsit for services and money contributed towards family expenses during such unlawful relation, even if there was express promise to pay.³

But an agreement by defendant to allow plaintiff, with whom he cohabited, in case they should separate, an annuity for life, provided she should continue single, is a valid agreement.⁴

So a bond given in consideration of past cohabitation is good; * but a bond for cohabitation with a woman seduced by the obligor, for maintenance after his death, is void.⁵

Past seduction and cohabitation have been held not a good consideration to support a grant of an annuity.⁶

Where a complaint stated that the plaintiff had cohabited with defendant as his mistress, and that it was agreed that no further immoral connection should take place between them, and that defendant should allow her an annuity as long as she should continue of good and virtuous life and demeanor, it was held that there was no good consideration, it not being averred that defendant was the seducer, and there is no authority to show that past cohabitation alone, or the ceasing to cohabit in the future, is a good consideration for such a promise.⁷

But a moral consideration is held sufficient to support a con-

¹ *Walker v. Perkins*, 3 Burr. 1568, 1 W. Bl. 517; *Friend v. Harrison*, 2 Car. & P. 524; *Wilson v. Ensworth*, 85 Met. 399; *Walker v. Gregory*, 36 Ala. 180; *Wallace v. Rappleye*, 103 Ill. 229, 249.

² *James v. Hoskins*, 1 Tidd, Pr. 547.

³ *Brown v. Tuttle*, 6 New Eng. Rep. 156, 80 Me. 62.

⁴ *Gibson v. Dickie*, 3 Maule & S. 463.

⁵ *Hill v. Spencer*, Ambl. 641; *Kings v. Moore*, 2 Sim. & Stu. 260; *Turner v. Vaughan*, 2 Wils. 339; *Nye v. Mosley*, 9 Dowl. & R. 165, 6 Barn. & C. 133; *Gray v. Matthias*, 5 Ves. Jr. 236; *Hall v. Palmer*, 8 Jur. 459, 13 L. J. Ch. 353.

⁶ *Walker v. Perkins*, 3 Burr. 1568, 1 W. Bl. 517; *Hanks v. Naglee*, 54 Cal. 51; *Baldy v. Stratton*, 11 Pa. 316; *Goodall v. Thurman*, 1 Head, 209.

⁷ *Beaumont v. Reeve*, 8 Q. B. 483, 18 Jur. 284, 15 L. J. Q. B. 141.

⁸ *Binnington v. Wallis*, 4 Barn. & Ald. 650.

tract under some circumstances. The Code of Georgia (§ 2741) expressly recognizes a strong moral obligation as a consideration for a contract; and there is no reason for confining this to executed contracts.

Thus a contract to make compensation for past illegal cohabitation, not contemplating its continuance, is legal.¹

An agreement by one partner who had become voluntarily disabled from service for the firm, made after dissolution, but before full settlement, to allow his copartner out of the assets a certain sum for past services, to compensate him for his own lack of services, is supported by a strong moral obligation, sufficient under Ga. Code, § 2741, although it would not be valid at common law.² But in the absence of statute according to the common law, as now generally understood and administered, such an obligation would not suffice as a consideration for an executory promise.³ Neither "love and affection," nor "blood relationship," nor "friendship," nor any mere moral duty or obligation, nor any voluntary courtesy, it has been held, constitutes a sufficient consideration for a promise not under seal.⁴ A mere moral obligation or duty already discharged is not a sufficient consideration to support a subsequent express promise to pay.⁵

b. **Good and Equitable Consideration.**—The duty of a father is a sufficient consideration to support the gift of land by him to a third person for the benefit of his daughter; and such gift cannot thereafter be revoked or altered without the consent of the daughter.⁶

¹*Smith v. Du Bose*, 78 Ga. 418.

²*Gray v. Hamil*, 6 L. R. A. 72, 82 Ga. 375.

³*Gray v. Hamil*, 6 L. R. A. 72, 82 Ga. 385; Chitty, Cont. 11th Am. ed. 52 *et seq.*; Wharton, Cont. §§ 512, 514; Bishop, Cont. § 44; Hare, Cont. 262 *et seq.*; *Lampshire v. Brathwait*, 1 Smith, Lead. Cas. 151, note.

⁴*Vance v. Wells*, 8 Ala. 399; *Montgomery v. Lampton*, 8 Met. (Ky.) 519; *Mills v. Wyman*, 8 Pick. 207; *Cook v. Bradley*, 7 Conn. 57; *Loomis v. Newhall*, 15 Pick. 159; *Hawley v. Farrar*, 1 Vt. 420; *Udike v. Titus*, 13 N. J. Eq. 151; *Musser v. Ferguson*, 55 Pa. 475; *Cobb v. Cowdery*, 40 Vt. 25; *Shepherd v. Rhodes*, 7 R. I. 470; *Glass v. Beach*, 5 Vt. 173; *Canal Fund Comrs. v. Perry*, 5 Ohio, 58; *Turner v. Patridge*, 3 Pa. 172; *Barlow v. Smith*, 4 Vt. 144; *Clark v. Herring*, 5 Binn. 83; *Dodge v. Adams*, 19 Pick. 429; *Ehle v. Judson*, 24 Wend. 97, cited in 1 Addison, Cont. 13.

⁵*Condon v. Barr*, 4 Cent. Rep. 558, 49 N. J. L. 53; *Kent v. Rand*, 2 New Eng. Rep. 860, 64 N. H. 45.

⁶*Knowles v. Brwin*, 43 Hun, 150.

A conveyance of land made by a father for the benefit of his illegitimate child is upon a good consideration.¹ Natural affection is a good consideration for an executed contract.² But a promise by a father to give his son a tract of land by his will, followed by expenditure in improvements, not, however, in execution of the contract or at the father's request, is without consideration, and cannot be enforced,³ and the natural affection of the father alone and his moral obligation and duty to provide for a bastard child, do not constitute a sufficient consideration to make him liable for its support, where there was no compromise with the mother or any demand by her for a verbal promise to provide for the child.⁴ But a deed made by a father for the benefit of his illegitimate child is upon a good consideration.⁵

A promise by the father of an illegitimate child to the mother to pay her an annuity if she would maintain the child, is, on performance by the mother, founded on sufficient consideration.⁶

A bond to pay an annuity to the mother of an illegitimate child, executed by the father, on condition that she should give him its custody or management, is given on good consideration.⁷

A settlement and discontinuance of a prosecution for bastardy and fornication is a good and legal consideration for a judgment note given by the reputed father to the mother of the child.⁸

Where a man having a legal wife deceives another woman by a void marriage, and has children by her, the facts furnish a good consideration for the assignment to her of a mortgage security.⁹

In *Hamer v. Sidway*, 12 L. R. A. 463, 124 N.Y. 538, a minor's abstinence from intoxicating liquors and tobacco, and from swear-

¹*Conley v. Nailor*, 118 U. S. 127, 30 L. ed. 112; *Gay v. Parpart*, 106 U. S. 679, 27 L. ed. 256; *Bunn v. Winthrop*, 1 Johns. Ch. 329, 1 L. ed. 159; *Hook v. Pratt*, 78 N. Y. 371; *Annandale v. Harris*, 2 P. Wms. 432; *Jennings v. Brown*, 9 Mees. & W. 496.

²*King v. Thompson*, 84 U. S. 9 Pet. 204, 9 L. ed. 102.

³*M'Clure v. M'Clure*, 1 Pa. 374.

⁴*Mercer v. Mercer*, 87 Ky. 30.

⁵*Conley v. Nailor*, 118 U. S. 127, 30 L. ed. 112.

⁶*Jennings v. Brown*, 9 Mees. & W. 496, 12 L. J. Exch. 86; *Hicks v. Gregory*, 8 C. B. 878, 13 Jur. 1030, 19 L. J. C. P. 84; *Smith v. Roche*, 6 C. B. N. S. 223, 5 Jur. N. S. 918, 28 L. J. C. P. 237.

⁷*Re Plaskett*, 80 L. J. Ch. 606, 9 Week. Rep. 628, 4 L. T. N. S. 544.

⁸*Stumpf's App.* 8 Cent. Rep. 113, 116 Pa. 33.

⁹*Gay v. Parpart*, 106 U. S. 679, 27 L. ed. 256.

ing or playing cards or billiards for money, is decided a good consideration for a promise by his uncle to pay him a sum of money. The defendant there contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise,—and insisted that it followed that, unless the promisor was benefited, the contract was without consideration,—a contention which, if well founded, it is said, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule the court said could not be tolerated, and is without foundation in the law. In *Lacota v. Newton* (an unreported case in the superior court of Worcester, Mass.), the complaint averred defendant's promise that "if you [meaning the plaintiff] will leave off drinking for a year I will give you \$100," plaintiff's assent thereto, performance of the condition by him, and it demanded judgment therefor. Defendant demurred, on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled. In *Talbott v. Stemmons* (Ky.), 5 L. R. A. 856 (a Kentucky case, not yet officially reported), the step-grandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson Albert R. Talbott \$500 at my death if he will never take another chew of tobacco or smoke another cigar during my life, from this date up to my death; and if he breaks this pledge he is to refund double the amount to his mother." The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained, and an appeal taken therefrom to the Court of Appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money, or contributed to his health; nevertheless, the

surrender of that right caused the promise, and, having the right to contract with reference to the subject matter, the abandonment of the use was a sufficient consideration to uphold the promise." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in *Lindell v. Rokes*, 60 Mo. 249. Certain cases sometimes cited on this question are not in point. In *Mallory v. Gillett*, 21 N. Y. 412; *Belknap v. Bender*, 75 N. Y. 446, and *Berry v. Brown*, 9 Cent. Rep. 896, 107 N. Y. 659,—the promise was in contravention of that provision of the Statute of Frauds which declares void all promises to answer for the debts of third persons unless reduced to writing.

A contract will be sustained if it rests upon an equitable consideration.¹ But no action can be maintained to enforce a gratuitous promise, however worthy the object in contemplation of the parties.²

c. **Mutual Promises.**—Contract must be mutually binding on the parties proposing to enter into it or it is void for want of mutuality.³

But concurrent promises, resting the one upon the other, and creating a reciprocity of obligation, constitute a good consideration for each other.⁴

Although a written agreement does not show upon its face that in the promises there is a mutuality of obligation or other considerations such mutuality or consideration may be proved by another written contract entered into at the same time, and shown to have been supported by an independent consideration, or treated in itself as a consideration for the former agreement.⁵

An exchange of notes of an equal amount made in good faith is based on a mutual and adequate consideration⁶ and a promise to

¹ *Wright v. Jones*, 2 West. Rep. 856, 105 Ind. 17; *Condon v. Barr*, 4 Cent. Rep. 557, 49 N. J. L. 58; *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279; *Elston v. Custor*, 101 Ind. 426. See 15 Cent. L. J. 386.

² *First Presb. Church v. Cooper*, 8 L. R. A. 468, 112 N. Y. 517; *Plunkett v. Black*, 117 Ind. 14; *Pfeiffer v. Campbell*, 111 N. Y. 631; *Clark v. Jones*, 85 Ala. 127.

³ *Cartwright v. McGown*, 10 West. Rep. 594, 121 Ill. 386.

⁴ *Buckingham v. Ludlum*, 2 Cent. Rep. 197, 40 N. J. Eq. 423. See *Ludlum v. Buckingham*, 35 N. J. Eq. 71, on appeal 89 N. J. Eq. 563; 1 Chitty, Cont. (11th ed.) 50; 1 Parsons, Cont. 477;

⁵ *Bolles v. Sachs*, 37 Minn. 315.

⁶ *Cohn v. Husson*, 119 N. Y. 609.

sell goods and a promise to purchase and to pay therefor are mutual and concurrent.¹

A conveyance of property made to a firm, under which the firm acquires title to the property, which it treats as firm property, is an adequate consideration for a note on the firm made by one of the firm.²

Where several mutually agree to pay money to be expended for a lawful object of common interest to the parties, the promise of each is considered as made in consideration of the promise of the others to contribute to the common object; and the fact that one promisor did not actively unite in subsequent acts, in advancement of the common object, done in the mode indicated in the contract of subscription, where he had due notice of all the proceedings and was invited to participate and did not object to the proceeding will not excuse his failure to pay.³

In *Vanderbilt v. Schreyer*, 91 N. Y. 392, the plaintiff contracted with defendant to build a house, agreeing to accept in part payment therefor a specific bond and mortgage. Afterwards he refused to finish his contract unless the defendant would guarantee its payment, which was done. It was held that the guaranty could not be enforced for want of consideration, for in building the house the plaintiff only did that which he had contracted to do. And in *Robinson v. Jewitt*, 116 N. Y. 40, the court simply held that "the performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract."⁴

Nor does a promise to pay a debt for which the promisor has already promised or is already bound, constitute a consideration sufficient to support a contract.⁵

¹*Pope v. Terre Haute Car & Mfg. Co.* 9 Cent. Rep. 321, 107 N. Y. 61.

²*Philpot v. Gruninger*, 81 U. S. 14 Wall. 570, 20 L. ed. 743.

³*Osborn v. Crosby*, 1 New Eng. Rep. 845, 63 N. H. 583; *George v. Harris*, 4 N. H. 533; *Moore v. Chesley*, 17 N. H. 151.

⁴*Dennis v. Piper*, 21 Ill. App. 169.

⁵*Harris v. Cassaday*, 5 West. Rep. 285, 107 Ind. 158; *Laboyteaux v. Swigart*, 1 West. Rep. 562, 108 Ind. 596; *Smith v. Boruff*, 75 Ind. 412; *Fensler v. Prather*, 43 Ind. 119; *Ritenour v. Mathews*, 42 Ind. 7; *Reynolds v. Nugent*, 25 Ind. 328; *Robinson v. Jewett*, 116 N. Y. 40; *Widiman v. Brown*, 83 Mich. 241.

An agreement, without other consideration than a promise to pay, to wait for money then due, is of no validity.¹

A promise to pay a note, by a surety, in ignorance of an extension whereby he is discharged, is without consideration and not enforceable.²

A promise by a creditor to forgive or relinquish part of his debt on the payment of the other part in money, in accordance with the existing contract, is without consideration and void.³

A release by an indorser of a promissory note of a joint maker on payment of part only of the amount due is, in the absence of any other consideration, without consideration and void.⁴

A promise by a party to save a witness harmless as to a forfeiture for failing, at a former term, to attend, on condition of his attending at the next term, is without consideration and void.⁵

d. Valuable Consideration.—The exchequer chamber in 1875 defined "consideration" as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

A release or a waiver of a legal right, at the request of another party, is a sufficient consideration for a promise.⁶

Forbearance of existing legal or equitable rights forms a good consideration for a contract, and will make it binding, although no benefit accrues to the party contracting.⁷

¹*Pfeiffer v. Campbell*, 111 N. Y. 631.

²*Rochester Sav. Bank v. Chick*, 6 New Eng. Rep. 383, 64 N. H. 410; *New Hampshire Sav. Bank v. Coleord*, 15 N. H. 119; *Edwards v. Tandy*, 36 N. H. 540; *Norris v. Ward*, 59 N. H. 487.

³*Day v. Gardner*, 5 Cent. Rep. 630, 42 N. J. Eq. 199, citing *Boyd v. Hitchcock*, 20 Johns. 76; *Le Page v. McCrea*, 1 Wend. 164; *Booth v. Smith*, 3 Wend. 66; *Perkins v. Lockwood*, 100 Mass. 250.

⁴*Bender v. Been*, 5 L. R. A. 596, and note, 78 Iowa, 233.

⁵*Sweeney v. Hunter*, 1 Murph. 181.

⁶*Given v. Corse*, 2 West. Rep. 579, 20 Mo. App. 132, citing 1 Parsons, Cont. (7th ed.) 473.

⁷*Boren v. Tipton*, 1 Cent. Rep. 494, 64 Md. 275; *Harris v. Cassaday*, 5 West. Rep. 386, 107 Ind. 158, citing *Wray v. Chandler*, 64 Ind. 146; *Sanford v. Freeman*, 5 Ind. 129; *Suark v. Malone*, 34 Ind. 444; *Nice-wanger v. Bevard*, 17 Ind. 621.

Forbearance of suit for which plausible grounds exist, is a good consideration for a promise to pay money.¹

A suspension of an existing actual demand is a sufficient and valid consideration.²

A compromise for a doubtful claim is a good consideration for a promise if the claim is made in good faith.³

A contract made in a compromise of differences in regard to the rights of the parties under a former contract, with regard to the construction of which they were not honestly agreed, was held to be founded upon a good consideration.⁴

The surrender of other instruments, held as collateral security, is a good consideration.⁵

The relinquishment of a defense asserted in good faith is a good consideration for a promissory note, although the defense is subsequently shown by a judicial decision to have been invalid.⁶

Release of the right to share in royalties on coal from certain lands is a sufficient consideration for a note for an agreed sum in lien thereof.⁷

An agreement by which a vendor releases a valuable right under his contract in consideration of the vendee's agreement to let judgment go against him by default for the price of the land is based upon a sufficient consideration.⁸

If a release is considered to be requisite to confirm the title of lands with which one has been connected, such release will be a good consideration for a promise, or for the payment of money.⁹

¹*Rus v. Meirs*, 10 Cent. Rep. 682, 43 N. J. Eq. 877.

²*Goodman v. Simonds*, 61 U. S. 20 How. 343, 15 L. ed. 984; *Wills v. Ross*, 77 Ind. 1; *Elling v. Vanderlyn*, 4 Johns. 287; *Morton v. Burns*, 7 Ad. & El. 19; *Baker v. Walker*, 14 Mees. & W. 465; *Jennison v. Stafford*, 1 Cush. 168; *Wilton v. Mascall*, 13 Mees. & W. 453; *Wheeler v. Slocumb*, 16 Pick. 52; Story, Prom. Notes, § 186.

³*Chamberlain v. Winn*, 1 Wash. 501.

⁴*Richardson v. Independent Dist. of Hampton*, 70 Iowa, 578.

⁵*Goodman v. Simonds*, 61 U. S. 20 How. 343, 15 L. ed. 984, citing *Depeau v. Waddington*, 6 Whart. 220; *Hornblower v. Proud*, 2 Barn. & Ald. 327; *Ridout v. Bristol*, 1 Cramp. & J. 281; *Bank of Salina v. Babcock*, 21 Wend. 499; *Youngs v. Lee*, 12 N. Y. 551.

⁶*Union Bank of Georgetown v. Geary*, 30 U. S. 5 Pet. 99, 8 L. ed. 60.

⁷*Trine's App.* (Pa.) 12 Cent. Rep. 657.

⁸*McDaniel v. Evans* (Ky.) 12 Ky. L. Rep. 497.

⁹*Sykes v. Chadwick*, 85 U. S. 18 Wall. 141, 21 L. ed. 824.

A performance of the consideration generally renders the contract binding, and gives a right of action upon it.¹

A promise to pay upon the performance of an act, by which the party is injured, becomes binding when the act is performed, unless stipulations as to time are not complied with and time is of the essence.² Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forbore or suffered by the party to whom the promise is made as consideration for the promise made to him."³

A consideration expressed in an agreement is sufficient to support it in the absence of evidence to prove a lack of consideration.⁴

"In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise."⁵ "Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise."⁶ Pollock, in his work on Contracts (p. 166), after citing the definition given by the exchequer chamber, already quoted, says: "The second branch of this judicial description is really the most important one. 'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first."

The withdrawal of a caveat by an heir-at-law is a sufficient consideration for a promise by devisees under the will as it stands, to pay the heir a specific sum.⁷

Money expended on the faith of a contract constitutes a valuable consideration.⁸

Expenditures made upon permanent improvements upon land, with the knowledge of the owner, induced by his promise, made

¹ *Wellington v. Apthorp*, 4 New Eng. Rep. 888, 145 Mass. 69, citing *Train v. Gold*, 5 Pick. 380; *Gardner v. Webber*, 17 Pick. 407; *Bornstein v. Lane*, 104 Mass. 214; *Goward v. Waters* 98 Mass. 596; *Collage St. M. E. Church v. Kendall*, 121 Mass. 528.

² *Hilton v. Southwick*, 17 Me. 308.

³ *Anson*, Cont.

⁴ *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170.

⁵ *Parsons*, Cont. *444.

⁶ Kent, Com. 12th ed. *465.

⁷ *Grandin v. Grandin*, 8 Cent. Rep. 588, 49 N. J. L. 508.

⁸ *King v. Thompson*, 84 U. S. 9 Pet. 204, 9 L. ed. 102.

to the party making the expenditure, to give the land to such party, constitute in equity a consideration for the promise.¹

Expenditure of one's own money for his own benefit where actually induced by the promise of another to repay the same, is a sufficient consideration for the promise.²

The surrender of a note given by the defendant's son upon a consideration, although not enforceable at law, is a sufficient consideration for a new note by the defendant.³

A promise to pay for goods furnished a third party prior to their delivery, upon the faith of which a sale and delivery are thereafter made, is upon a sufficient consideration.⁴

A promise conditioned upon the conveyance to the promisor of a possible interest which he believes the promisee has, but which the latter to his knowledge does not claim, is supported by a sufficient consideration.⁵

Extension of time of payment, under a conditional sale of engines, and the permitted use of the engines during such time by the vendee, is a sufficient consideration for note and mortgage by him.⁶

The maker's assent to the proposed compromise of his claim against a third person is sufficient consideration of a promise by the holder of notes against such maker to accept in full payment such percentage as was received in the settlement of such claim.⁷

Where land was about to be sold to create a fund to pay an annuity to a widow, an agreement by which she reduced her claim, with one honestly claiming an interest which created a cloud upon title, the removal of which would enhance the price, was upon a sufficient consideration.⁸

A promise by a habitual drunkard to his physician, that he would pay him \$100, in consideration of which the physician

¹*Freeman v. Freeman*, 48 N. Y. 34, affirming 51 Barb. 306.

²*Devecmon v. Shaw*, 12 Cent. Rep. 886, 69 Md. 199.

³*Whitney v. Clary*, 5 New Eng. Rep. 152, 145 Mass. 156; *Wilton v. Eaton*, 127 Mass. 174.

⁴*Lindsay v. Heaton*, 27 Neb. 662.

⁵*Valle v. Picton*, 8 West. Rep. 734, 91 Mo. 207.

⁶*Sinker v. Green*, 12 West. Rep. 912, 118 Ind. 264; *Hutchings v. Munger*, 41 N. Y. 155.

⁷*Hunt v. Brown*, 5 New Eng. Rep. 810, 146 Mass. 253.

⁸*Woodburn v. Woodburn*, 11 West. Rep. 789, 123 Ill. 608.

undertook and promised to cure him of his appetite for ardent spirits, is a binding contract.¹

S, lord of the manor, had the power of appointment of steward of the manor, and G, the then steward, resigned his office in consideration that S would pay him an annuity for life; and K, in consideration of S permitting him to hold the office at the will of S as lord, promised S to pay, out of the fees of the office, such annuity to G during G's life so long as K should execute the said office. S appointed K to such office for K's life, and died. It was held that the consideration of the promise was sufficient, and that K was liable to pay the annuity to G after the death of S, so long as K held such office.²

The surrender of an overdue note, enforceable as against one of the indorsers, is a valuable consideration for a new note between the same parties, with an additional indorser.³

The payment of a doubtful claim in full, to prevent litigation, will constitute a valuable consideration, but it is otherwise when the amount simply is in dispute, and no more was paid than was actually due.⁴

An agreement, on part payment of a judgment debtor to pay the balance of the judgment in a few days, upon an agreement of the other party to refrain from enforcing an execution, is founded upon a valuable consideration.⁵

An agreement to credit a transferred debt upon a precedent debt is a valuable consideration.⁶

A consideration may be defined to be either a benefit accruing to the promisor, or a loss or disadvantage sustained by the promisee.⁷

¹*Fisk v. Townsend*, 7 Yerg. 146.

²*Matlock v. Southwood*, 8 Ad. & El. 795, 1 Perry & D. 46, 1 W. W. & H. 667.
See note to *Talbot v. Stommons* (Ky.) 5 L. R. A. 856.

³*Bromley v. Hawley*, 5 New Eng. Rep. 660, 60 Vt. 46; *Churchill v. Bradley*, 58 Vt. 408; Rob. Dig. p. 100, § 127.

⁴*Emmitsburg B. Co. v. Donoghue*, 9 Cent. Rep. 69, 67 Md. 383; 1 Parsons, Cont. 469; 1 Addison, Cont. 11.

⁵*Smith v. O'Brien*, 5 New Eng. Rep. 842, 146 Mass. 294.

⁶*Throop Grain Cleaner Co. v. Smith*, 12 Cent. Rep. 918, 110 N. Y. 83.

⁷*Day v. Gardner*, 42 N. J. Eq. 199, 5 Cent. Rep. 631.

Any benefit to defendant or detriment, however slight, to plaintiff is a sufficient consideration.¹

A consideration to support a promise need not inure to the personal benefit of the promisor; it is sufficient if it consists in a detriment to the person to whom the promise is made.²

Nor is it at all essential that a person to whom the consideration of a promise moves should be benefited provided the person from whom it moves is in even a legal sense injured; and the injury may consist of a release or a compromise of a disputed claim or forbearance to exercise a legal right, the alteration in position of the parties being regarded as a detriment forming a consideration independent of the actual value of the right forborne.³

Damage to the promisee as a matter of law constitutes as good a consideration to support a contract as benefit to the promisor.⁴

A very slight advantage to one party, or what he considers such, constitutes a sufficient consideration to support a contract, in the absence of fraud or mistake.⁵

A valuable consideration, however small, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract, or contract of guaranty.⁶

Although a verbal promise three or four years old, made by a

¹*Green v. Corae*, 2 West. Rep. 580, 20 Mo. App. 182; *Waterman v. Barrett*, 4 Harr. (Del.) 811; *Harrington v. Wells*, 12 Vt. 505; *Columbus v. Columbus St. R. Co.* 10 West. Rep. 440, 45 Ohio St. 98; Story, Cont. § 548; 1 Parsons, Cont. 7th ed. 473; *Hitchcock v. Coker*, 6 Ad. & El. 438; *Southall v. Rigg*, 11 C. B. 481; *Haigh v. Brooks*, 10 Ad. & El. 309; *Shortrede v. Cheek*, 1 Ad. & El. 57.

²*New Hanover Bank v. Bridgers*, 98 N. C. 67; *Churchill v. Bradley*, 2 New Eng. Rep. 491, 33 Vt. 408.

³*St. Mark's Church v. Teed*, 120 N. Y. 583; *Woodburn v. Woodburn*, 23 Ill. App. 289, reversed on other grounds in 11 West. Rep. 789, 13 West. Rep. 505, 123 Ill. 608; *Martin v. Stubbings*, 27 Ill. App. 121, affirmed in 126 Ill. 387; *Murtaugh v. Colligan*, 28 Ill. App. 433; *Piper v. Foster*, 121 Ind. 407; *Allen v. Platt*, 79 Iowa, 113; *Vogel v. Meyer*, 23 Mo. App. 427; *Fulter v. Claffin*, 51 Hun, 609; *Oregon Pac. R. Co. v. DeForest*, 32 N. Y. S. R. 178.

⁴*Townley v. Sumrall*, 27 U. S. 2 Pet. 170, 7 L. ed. 386; *Violett v. Patton*, 9 U. S. 5 Cranch, 142, 3 L. ed. 61; *United States v. Linn*, 40 U. S. 15 Pet. 290, 10 L. ed. 742; *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. ed. 855; *Stillwell v. Aaron*, 69 Mo. 545.

⁵*Traphagen v. Voorhees*, 11 Cent. Rep. 370, 44 N. J. Eq. 21; *Harlan v. Harlan*, 20 Pa. 303; 2 Co. Litt. §§ 212, 344a; *Kellogg v. Richards*, 14 Wend. 116; *Brooks v. White*, 3 Met. 283.

⁶*Lawrence v. McCalmont*, 43 U. S. 2 How. 426, 11 L. ed. 326; *Austyn v. M'Lure*, 4 U. S. 4 Dall. 227, 1 L. ed. 811, citing *Dutchman v. Tboth*, 5 Bing. N. C. 577.

father to his son, to give the latter land of a certain value, in excess of the share which will fall to his other children, if he will not leave home, as another son has done, it not being shown that the son abandoned an intended removal in consequence of such promise, is not a sufficient consideration for a promissory note for an amount equal to the value of the land mentioned,¹ yet it is held in *Burr v. Wilcox*, 13 Allen, 273, that "any act done at the defendant's request and for his convenience or to the inconvenience of the plaintiff would be sufficient" to support a promise by the defendant,—citing *Train v. Gold*, 5 Pick. 380; *Amherst Academy v. Couls*, 6 Pick. 427; *Hubbard v. Coolidge*, 1 Met. 84. And see *Conover v. Stillwell*, 34 N. J. L. 54.

Where a contract or gift sought to be annulled can only be treated as a disguised, onerous and remunerative donation in which the value of the consideration, charges, and services exceed one half the value of the object, it stands as an onerous contract, and is subject to no vice applicable to such contracts which would authorize its annulment, under the Louisiana Civil Code.²

An agreement, in a conveyance, to perform certain services for the grantors, during the life of themselves and their survivor, and an executed life lease of lands to the grantors, constitute a good consideration for a conveyance.³

Where in pursuance of a verbal agreement between father and son that the latter should have a certain farm of the father, the son took possession of the premises and expended money and labor upon them, such acts and expenditures constitute a valuable consideration for the contract.⁴

An agreement with his sister, to leave to her daughter one moiety of his estate, made by a brother, if the daughter would take the care of his wife and himself, can be enforced against the uncle's estate after the performance by the niece.⁵

An inducement to another, a relative by marriage of the promisor's daughter, that if he would purchase certain land, the pro-

¹*Head v. Baldwin*, 88 Ala. 182.

²*Dopler v. Feigel*, 40 La. Ann. 848.

³*Gardner v. Lightfoot*, 71 Iowa, 577.

⁴*Haines v. Haines*, 6 Md. 485.

⁵*Boehl v. Hausmeyer*, 12 West. Rep. 899, 114 Ind. 311. See to same effect *Wellington v. Apthorp*, 4 New Eng. Rep. 888, 145 Mass. 69; *Pfugur v. Putts*, 43 N. J. Eq. 440, 9 Cent. Rep. 488.

ceeds of certain securities would be given him, when collected, can be enforced.¹

But where A, being wealthy and childless, verbally promised his brother B, who was poor and with many children, that if he would not remove to the west country, but would move to and settle on a lot of land of A, he would convey it to him, and B accepted the offer, and took possession of the land, it was held that the promise was not supported by either a valuable or meritorious consideration, and would not be enforced specifically against the heirs of B.²

A part performance of service, under a contract for a year, terminated by the death of the promisee, may be recovered for in full by the widow of the promisee, where the promise was of a gross sum, to be paid the promisee, or in the event of his death, to his wife.³

e. Expectation of Results, not a Consideration.—But while the hope or strong probability of realized results often leads to the execution of a contract, it must be remembered that there is a clear distinction sometimes between the motive that may induce to entering into the contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for the promisor's undertaking. Though the expectation has led to the formation of the contract, neither the expectation nor the result is "the cause or meritorious occasion requiring a mutual recompense in fact or in law." Dyer, 306, *b*. Thus a creditor may do a favor to his debtor, or may enter into a new and independent contract with him, induced by which, the debtor may assent to giving a note for the previous existing indebtedness. Without the favor or the new contract, there is in such a case a full consideration for the note, and the parties may not have contemplated that the favor or the new contract was to be paid for. To regard them as entering into the consideration of the note, would be to make a contract for the parties to which their minds never assented.⁴

¹*Scott v. Osborne*, 2 Munf. 413.

²*Reed v. Vannordale*, 2 Leigh, 569.

³*Jones v. McCallum*, 21 Fla. 392.

⁴*Philpot v. Gruninger*, 81 U. S. 14 Wall. 570, 20 L. ed. 743.

f. Voluntary Service or Promise; Existing Obligations.

—A mere voluntary promise, without consideration of any kind, either legal or equitable, is not enforceable.¹

A promise by a husband to his wife on her death-bed that their son should have certain property, does not constitute a valuable consideration for a conveyance by him to the son.²

There must be a consideration to sustain an agreement by a creditor to allow a new trial to a defeated debtor, in a suit on the debt.³

Voluntary service or labor done without the privity or consent of the defendant, however beneficial to him, as a voluntary service in saving his property from destruction by fire, will not support a promise;⁴ for an act done for the benefit of another, without his request, is to be deemed a voluntary act, for which no action can be sustained. But, it has been held, that if, after knowing of the service the person benefited promises to pay for it, an action may under certain circumstances be sustained on the promise.⁵ But generally, if there be no request, nor promise to pay for service, a subsequent promise to make compensation therefor is void.⁶

A promise to pay a niece for services in one's family, of which she was a member, made after she had married and left the family, is void for want of consideration.⁷ But it is equally true that a past act or service rendered pursuant to a previous request of the promisor is sufficient to sustain an action on a subsequent promise.⁸

There must be the concurrence of the minds of all parties in reference to the thing to be done, as the essence of a contract is the mutual agreement.⁹

¹*Bramble v. Lumsden*, 80 Ga. 707; *Nelson v. Pickwick Associated Co.* 30 Ill. App. 333.

²*Peek v. Peek*, 1 L. R. A. 185, 77 Cal. 106.

³*Plunkett v. Black*, 117 Ind. 14.

⁴*Bartholomew v. Jackson*, 20 Johns. 28.

⁵*Glenn v. Savage*, 14 Or. 567.

⁶*Little v. Rees*, 84 Minn. 277.

⁷*Robinson v. McAfee*, 59 Mich. 375.

⁸*Trine v. Williamson* (Pa.) 12 Cent. Rep. 657, 1 Chitty, Cont. 69; *Dyer*, 272, note b; *Carman v. Noble*, 9 Pa. 371.

⁹*Jensen's T. E. & B. v. Thurber*, 118 N. Y. 684; *Shaw v. Woodbury Glass Works*, 52 N. J. L. 7; *Wallingford v. Columbia & G. R. Co.* 26 S. C. 253; *Dorsey v. Pike*, 50 Hun, 534.

Therefore if anything is left open or undetermined which is an essential part of the contract and not a mere incident, so that the minds of the parties have not met, no contract exists.¹

There can be no meeting of minds if one party has no mind capable of consenting to the terms of the proposed contract which can meet the mind of the other party, in full consideration of the subject matter.²

g. Wager Policies on Life.—The revelations made in the course of an action against an insurance company at the 1891, Manchester, England, assizes, have forced into the public notice as hideous a traffic in human life as ever disgraced a civilized country. Gambling in lives has in many Lancashire towns, but chiefly in Blackburn, long been a lucrative occupation. The insurance companies are hoodwinked and defrauded, and the miserable victims of the conspiracy are, by means not actually criminal, shuffled out of life. Husbands insure their wives, wives their husbands, children their parents.

Anyone who is believed to be "within measurable distance" of the grave is fair game for the speculator. He scans his neighbor as a valuer scans a household of furniture. Let but the symptoms of consumption or any other fatal disease appear and he makes insinuating advances to secure a policy on the doomed one's life. Of course his victims are, as a rule, selected from the very dregs of humanity—the drunken, diseased and feeble—who for the sake of prospective drinks readily sign the "bit o' paper," and thenceforward have their path to the grave smoothed and facilitated by the creatures who fatten upon them.

The case heard at the Manchester assizes differs in no essential respect from a hundred others. The victim in that case was a wretched old hostler or hanger-on of a public house. He had not a copper in the world to call his own, but he had something much more valuable to others; he had unequivocal symptoms of speedy disease. Forthwith he was honored with the anxious attention of the harpies. Glowing reports were made to the insurance companies of the prospects of reaching a patriarchal age, and in the

¹*Mattoon Mfg. Co. v. Oaklough Mut. F. Ins. Co.* 69 Wis. 564.

²*Dickerson v. Davis*, 9 West. Rep. 680, 111 Ind. 433; 1 Parsons, Notes and Bills, 149.

and the poor old fellow, trembling on the brink of eternity, bore the burden of twenty policies, with a total value of £1,700. Happily, one of the insurance companies had the courage to fight the conspiracy by disputing the claim, and was victorious. Indeed, the barrister engaged for the plaintiff, when he saw the sort of case he was put up to champion, honorably threw up his brief.

This case is but a type of hundreds of others which have made life insurance a term of evil import in the north of England. In Blackburn a common loiterer about the market place is insured in various companies for nearly £9,000. He is aware of the fact that death will materially increase his commercial value, but so long as his income of a few shillings is supplemented by fees for signing insurance papers "he does not care how long the thing goes on." The poor wretch is respectably connected and once held a decent position in society, but a life of dissipation has brought him into the web of the insurance speculator, whence he will never escape save in a coffin. In another case a man who spends a large portion of his time in the work-house is insured for £3,880, and in a third a hawker of bags of coal, who, living, is worth hardly the clothes upon his back, will as a corpse be valued at £1,900.

Many of the miserable beings thus traded upon are totally unconscious of the enormous sums which are involved when they "sign a bit of paper" for a "friend" and a drink. In one instance a poor, sickly weaver, who is insured in one office alone for £1,000, when asked whether he knew the amount of his insurance, replied, "Well, nobbut a few pounds; twenty or thirty, happen." He admitted that he had never paid the premiums and that he did not know the person who had acted as referee. Further investigation showed that the policy had been effected by an intermediary, who, in consideration of a portion of the commission, had served to conceal the identity of the insurer.

Gambling in lives, like gambling in stocks or on the turf, not infrequently involves loss to the gambler. Some of the wrecks of humanity, who are the special objects of the solicitude of the speculator, display a most unexpected tenacity to their thread of life. With one foot in the grave they yet manage to keep the other out for an unconscionable time. Even the constant supply of neat

brandy with which their patrons indulge them, with the view of assisting them more speedily to a better world, is often ineffectual. Nay, it seems only to increase the vitality of the remaining leg. One typical case will suffice as an instance.

A certain feeble and apparently moribund old man has been the subject of very particular attention from the speculating fraternity, who have insured him wholesale. His signature to policies has been eagerly sought after and he has reveled in unlimited supplies of spirits for years. He has, however, proved himself an uncommonly tough morsel for his patrons. Racked by cough, afflicted by rheumatism, he yet "lags superfluous on the stage," and not a few policies upon his life have been allowed to lapse. One speculator alone has paid more than £40 above what he will receive when the hardy old man's final *adieu* is uttered.

Doubtless the wonder will be that these conspiracies against the insurance companies are possible. The system, however, is very simple. The speculators are in league with the more unscrupulous insurance agents, from whom they receive a portion of the commission the companies allow on new policies. They act as the agents' *touts*, and after taking an inventory of the victim's prospects of a reasonable early death, induce him or her to be insured.

This done, the rest is easy, for with the agent co-operating with him the speculator has little difficulty in hoodwinking the company and palming upon it a life which, were the true facts made known, would be accepted on no conditions whatever. It is only fair to say that the majority of the agents are honorable men, but the proportion of unscrupulous agents who lend themselves to the ghoulish practices of the speculators is alarmingly large. The insurance companies chiefly concerned are at last becoming alive to the enormity of the conspiracies against them, and now that one of them has had the courage to expose the system and has scored an easy triumph, drastic measures may be adopted to stop the accursed traffic in human life.

A promise, in consideration of permission to insure the life of a person, to pay his wife a sum of money after his death is on a void consideration where the promisor has no insurable interest in the life on which the insurance is taken, and therefore cannot be enforced.*

**Burbage v. Windley*, 12 L. R. A. 409, 108 N. C. 357.

Where the assured had no insurable interest in the life of the *cestui que vie*, the contract of insurance was simply a wager; it was not founded upon any just or lawful consideration; it was a mere gambling speculation. The assured was not to be indemnified against loss, injury or disadvantage in any respect growing out of the life he insured; the insurance was not intended to serve any legitimate business purpose or end; it was purely a matter of speculation, founded upon nothing but hazard. Such contracts and speculations are wholly unnecessary. They cannot serve or promote any useful and wholesome purposes of individuals, society or government. They do not stimulate, promote or encourage industry, enterprise, legitimate business, sound morality or increase the wealth of the people, or the strength and power of the State. On the contrary, their nature and uniform experience go to show that they represent nothing substantial or valuable, or of practical advantage to persons or communities. They strongly tend to demoralize society, and embarrass industries and general business. In their very nature they stimulate, afford incentives to and encourage those who become parties to them, to resort to sinister, oftentimes criminal, means to turn or end the hazard in their favor, and thus gain unjust and dishonest advantage. They encourage men to engage in the business of speculation in hazards, not necessary or useful in the general purposes and businesses of life, but which is positively and seriously injurious to them. Such contracts and speculations contravene the justice and policy of the law,—they are *contra bonos mores*, and are therefore void. It is well settled, by a multitude of uniform decisions, that all contracts against the policy of the law, and such as contravene sound morality, are on such account void.¹

In *Shepherd v. Sawyer*, 2 Murph. 26, the court held that when "A agreed with B, for 2½ per cent premium paid down, to insure a negro slave reported to be lost in Pasquotank River. B had no interest in the negro; yet, his loss being proved, B is entitled to recover his value." The decision is placed upon the ground that it was an "innocent wager," and that such wagers were sanctioned by the common law. The opinion of the court is very

¹*Sharp v. Farmer*, 4 Dev. & B. L. 128; *Blythe v. Lovinggood*, 2 Ired. L. 20; *Ingram v. Ingram*, 4 Jones. L. 188; *King v. Winants*, 71 N. C. 469; *Williams v. Carr*, 80 N. C. 295; *Griffin v. Hasty*, 94 N. C. 488.

brief, and no authority is cited to show that it was "innocent," nor is any reason stated why it was such wager. If the court intended that the case should have general application to wagers in insurance, embracing cases like the present one, it is not sustained by the greater weight of reason, or the greater weight of authority, certainly at the present day.¹

A policy taken upon the life of another for speculative purposes is regarded as nothing more than a wager.²

The insurable interest must be of a substantial character, and such as, under all the circumstances, to take from the transaction all suspicion of wagering.³ But an insurable interest must be actual and such as will reasonably justify a well grounded expectation of advantage, dependent upon the life of the insured.⁴

The law seems to be well settled that it is wholly unnecessary to prove an insurable interest in the life of the assured, at the maturity of the policy, if it was valid at its inception; and in the absence of express stipulation to the contrary, the sum expressed on the face of the policy is the measure of recovery.⁵

Where a third party, without any insurable interest in the life of another, procures a policy of insurance on the life of such person, either by having a policy issued directly to himself, or by having the person whose life is insured take out a policy to himself and then assign it, the transaction is a mere speculation on the life of another, and, as such, contrary to public policy and void.⁶

¹*Ruse v. Mutual Ben. L. Ins. Co.* 28 N. Y. 516; *Lord v. Dall*, 12 Mass. 115; *Franklin L. Ins. Co. v. Hazzard*, 41 Ind. 116; *Cammack v. Lewis*, 82 U. S. 15 Wall. 643, 21 L. ed. 244; *Ætina L. Ins. Co. v. France*, 94 U. S. 561, 24 L. ed. 287; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924.

²*Amick v. Butler*, 9 West. Rep. 843, 111 Ind. 578; *Ruse v. Mutual Ben. L. Ins. Co.* 28 N. Y. 516; *Brockway v. Mutual Ben. Ins. Co.* 9 Fed. Rep. 249; *Bliss, L. Ins.* § 9.

³*Amick v. Butler*, 9 West. Rep. 843, 111 Ind. 578; *Connecticut Mut. L. Ins. Co. v. Luchs*, 108 U. S. 498, 27 L. ed. 800; *Corson's App.* 4 Cent. Rep. 307, 118 Pa. 488.

⁴*Corson v. Garnier, (Pa.)* 4 Cent. Rep. 308; *Baker v. Union Mut. L. Ins. Co.* 43 N. Y. 283; *Keystone Mut. Ben. Asso. v. Norris*, 7 Cent. Rep. 204, 115 Pa. 446; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924.

⁵*Rauels v. American Mut. L. Ins. Co.* 27 N. Y. 232; *Mowry v. Home L. Ins. Co.* 9 R. I. 846; *Hoyt v. New York L. Ins. Co.* 8 Bosw. 440; *Phanix Mut. L. Ins. Co. v. Bailey*, 80 U. S. 13 Wall. 616, 20 L. ed. 501.

⁶*Lamont v. Grand Lodge Iowa L. of H.* 81 Fed. Rep. 180; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924. See *Seigrist v. Schmalts*, 5 Cent. Rep. 230, 113 Pa. 326; *Downey v. Hoffer*, 16 W. N. C. 185.

A policy of insurance taken out on the life of a third party by a beneficiary in the continuance of whose life the beneficiary has no pecuniary interest, is a wagering policy and as such is void.¹

A life insurance policy for \$3,000 as security for a \$100 debt is a wager.²

A policy on the life of another for \$3,000, to cover a debt of \$70, is a mere wagering policy.³

A policy taken out by a creditor on the life of his debtor in the sum of \$3,000, \$2,000 for his own benefit and \$1,000 for the benefit of his debtor, while the debtor in fact owned him only \$70, is a wagering policy.⁴

Where a creditor had insured his debtor's life on two several occasions, and had to abandon the policies on account of insolvency of the companies, then took out a third policy for \$3,000, paying \$302 therefor, the debtor being sixty-five years old, it was held that there was no disproportion of which the debtor's administrators could take advantage.⁵

An insurance on the life of the debtor for \$2,000, where the indebtedness was uncertain, but was afterwards ascertained to be between \$500 and \$750, was held under the circumstances not a wager.⁶

So where he took out policies, on which he became liable to be assessed as a member of the association, and paid thereon, within about nine months thereafter, the sum of \$351.75, and the amount collected on which, on the debtor's death, was \$2,124.82, being an excess of \$474.53 over the amount of the debt, there was no such disproportion as would warrant a condemnation of the transaction as a speculation or wager.⁷

¹*Bloomington Mut. L. Ben. Assn. v. Blue*, 8 West. Rep. 642, 120 Ill. 121; *Cammack v. Lewis*, 82 U. S. 15 Wall. 643, 21 L. ed. 244; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997; *Gilbert v. Moose*, 104 Pa. 74; *Scott v. Dickson*, 108 Pa. 6.

²*Cooper v. Shaeffer* (Pa.) 9 Cent. Rep. 601; *Gilbert v. Moose*, 104 Pa. 74; *Corson's App.* 4 Cent. Rep. 807, 113 Pa. 438; *Grant v. Kline*, 7 Cent. Rep. 626, 115 Pa. 618.

³*Cammack v. Lewis*, 82 U. S. 15 Wall. 643, 23 L. ed. 244.

⁴*Connecticut Mut. L. Ins. Co. v. Luchs*, 108 U. S. 498, 27 L. ed. 800.

⁵*Grant v. Kline*, 7 Cent. Rep. 626, 115 Pa. 618.

⁶*Corson v. Garnier* (Pa.) 4 Cent. Rep. 308.

⁷*Rittler v. Smith*, 2 L. R. A. 844, 70 Md. 261.

The sum insured must not be grossly disproportionate to the interest the holder of the policy has in the life insured, without leaving the transaction open to the imputation of being a speculation or wager upon the hazard of a life.¹

The essential point is that the transaction be bona fide, and not a device to evade the law.²

In *Burbage v. Windley*, 12 L. R. A. 409, 108 N. C. 357, as expressly alleged, the permission was granted to the testator of the defendant by the former husband of the *feme* plaintiff, Hammond, to insure the latter's life. If such permission, in any case or connection, could be a valuable privilege or advantage, in this case it was granted with the view and for the purpose of enabling and helping Windley to make an unlawful contract—a wager—on the life of Hammond. Thus the latter became connected with and intended to share in the wagering transaction. The promise to pay \$500 to the *feme* plaintiff was expressly based upon and grew out of it; it was, as to Hammond and his wife, part of it. It partook of the wager,—the vicious nature of the contract of insurance. Such consideration was therefore void. Hence the promise founded upon it was without legal sanction, and of no binding effect, in contemplation of law. *Ex terpi causa non oritur actio*.³

If, in good faith, the purpose had been to insure the life of Hammond for the benefit of his wife, the case, as to her, might be very different. But this was not the purpose, or any part of it. The insurance was for the benefit of Windley; the policies were granted to and made payable to him; he promised to pay the small sum mentioned to the *feme* plaintiff for permission to insure the life.

The Supreme Court of Pennsylvania has recently, in *Ulrich v.*

¹ *Wainwright v. Bland*, 1 Mood. & R. 481; *Miller v. Eagle L. & H. Ins. Co.* 2 E. D. Smith, 268; *Grant v. Kline*, 7 Cent. Rep. 626, 115 Pa. 618.

² *Amick v. Butler*, 9 West. Rep. 843, 111 Ind. 578, citing *Provident L. Ins. & Inv. Co. v. Baum*, 29 Ind. 236; *Olmsted v. Keyes*, 86 N. Y. 593; *Campbell v. New England Mut. L. Ins. Co.* 92 Mass. 381; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35; *Murphy v. Red*, 64 Miss. 614; *Cunningham v. Smith*, 70 Pa. 450. See notes to *Equitable L. Assur. Soc. v. Hazlewood* (Tex.) 7 L. R. A. 219; *Roller v. Beam* (Va.) 6 L. R. A. 187.

³ *Duke v. Asbee*, 11 Ired. L. 112; *Bettis v. Reynolds*, 12 Ired. L. 344; *Covington v. Threadgill*, 88 N. C. 186; *Griffin v. Hasty*, 94 N. C. 438.

Reinoehl, — Pa. —, 13 L. R. A. 433, decided that the question as to the validity of a policy depending on the excess of the amount of insurance over the debt, the facts being admitted, is a question of law. And a rule is also stated for determining the question of what is an unreasonable excess. In that case the defendants were doing a firm business at Lebanon, Pa., and hold a judgment against one Andrew Bleistine, in the Court of Common Pleas of Lebanon County, which, with interest and costs amounted to \$110.02. The judgment was sufficiently secured on real estate, and the defendants were not pressing their debtor for the money. He was being pressed by other creditors who held subsequent liens on his property. It was necessary to quiet them for Bleistine to pay off the judgment held by the defendants, or get rid of it in some manner. Not having the money he applied to the defendants to satisfy it, and take a policy on his life instead. The evidence is uncontradicted that the defendants were averse to this, and for a time declined, but finally yielded to Bleistine's entreaties, and his wife's tears, to save their home. The evidence shows that Bleistine offered them an insurance of \$3,000, or \$5,000, or \$10,000, or any amount they wanted. The negotiation resulted in the defendants taking a policy of \$3,000 on the life of Bleistine in the U. B. Mutual Aid Society. The policy was issued in the name of Bleistine as beneficiary and afterwards assigned by him to the defendants, who paid the entrance fee and all subsequent assessments. The assignment was absolute and not as collateral security, and the judgment referred to was satisfied of record. After Bleistine's death the insurance money was paid by the company to the defendants. Subsequently this suit was brought by the executor of Bleistine to recover from them the amount received over the debt and interest, and premiums paid, the plaintiff alleging that the amount of insurance was so disproportioned to the debt as to make it a gambling transaction within the doctrine of *Gilbert v. Moose*, 104 Pa. 74, and the cases following it.

The court in deciding the case say that we may safely assume that the debt due by Bleistine to the defendants was bona fide; that so far from the latter having procured the former to insure his life for their benefit for speculative purposes, they entered

into it with reluctance at the earnest request of Bleistine and his wife, to relieve them from financial embarrassment and to save their home. This, it is held, takes out of the case the controlling element which existed in *Gilbert v. Moose*, and that line of cases. Yet if the defendants, even for an honest purpose, have transgressed the law, and made this a gambling transaction, they must suffer the penalty for such violation.

The first and second assignments of error are said to present the main question in the case. Upon the trial below the defendants proved, under exception, the life expectancy of Bleistine, and the amount of assessments on this policy had he lived out his full life expectancy. It appears from this evidence that the insured was forty-two years of age, and that his expectation of life, according to the Carlisle Tables, was twenty-six years; that had he lived that length of time the interest on the judgment, with the annual dues and assessments and interest thereon, would have amounted to \$4,336.31, being \$1,336.31 in excess of the amount of the policy. This evidence was not contradicted. Its admission forms the subject of the first assignment.

In the second assignment of error complaint is made that the judge erred in his answer to the plaintiff's sixth point. The point is as follows: "The amount allowed and paid as the consideration of the transfer of the insurance, to wit, the sum of \$99.51, with interest thereon from December 7, 1875, to April 2, 1877, and the costs were grossly inadequate; and the disproportion between that amount and the amount of the insurance—\$3,000—is so great as to require the court to say, as matter of law, that the transaction was a wager, and that in this action Reinoehl & Menily have no right to retain more of the insurance money received by them than the amount of their satisfied judgment with interest and costs, and the premiums and assessments paid by them, with interest thereon, and therefore the verdict of the jury must be in favor of the plaintiff for the amount received by the defendants, with interest from the date of its receipt, less the amount of the judgment, interest and costs, and assessments and premiums paid with interest." This point was refused.

In examining this ruling it is said that whether the question of excess of insurance is to be disposed of by the court as a matter

of law, or by the jury as a question of fact, it is essential that there should be a fixed rule. The importance of this was recognized by the judge in delivering the opinion of the court in *Grant v. Kline*, 115 Pa. 618, 7 Cent. Rep. 626, where he said: "Speaking for myself, it may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest, and the amount of premiums with interest thereon, during the expectancy of life, as shown by the Carlisle Tables. This view, however, has never been adopted by this court in any adjudicated case, nor do we feel compelled to define the disproportion now in view of the particular facts of the case in hand." In the subsequent case of *Cooper v. Shaeffer* (Pa.) 9 Cent. Rep. 601, Sterrett, J., after quoting the above, remarked: "This appears to be a just and practicable rule." No such rule was established, however, in *Cooper v. Shaeffer*. In that case there was an insurance of \$3,000 to cover a debt of \$100, and the court said, through Mr. Justice Sterrett: "In view of the undisputed facts, the learned judge of the common pleas held that the disproportion between the insurance of \$3,000 and the debt of \$100 was so great as to require him to say, as matter of law, that the transaction was a wager, and that the assignors of the policy had no right to retain more of the insurance money recovered by them than the amount of the debt, plus the premiums paid and interest thereon. In this he was clearly right. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law."

It seems clear that in a proper case where the facts are not disputed, it is the duty of the court to pronounce upon the character of the policy. Thus in *Grant v. Kline*, *supra*, it was said: "To take out a policy of \$5,000 to secure a debt of \$5 would be such a palpable wager that no court would hesitate to declare it so as matter of law." It is true this remark was made by way of illustration, and it is only referred to for that purpose now. *Cooper v. Shaeffer* decided nothing but that particular litigation. It laid down no rule for the future beyond its own particular facts, viz: That an insurance of \$3,000 for a debt of \$100, unexplained, was a gambling policy. It may be asked why it does not rule a case where the amount of insurance was the same and a difference of

a few dollars only in the amount of the debt? The answer is not difficult. *Cooper v. Shaeffer* was decided upon the single ground of the disproportion between the insurance and the debt. There were no facts in evidence by which this disproportion could be explained, or shown to be justifiable. This appears by the report of the case as well as from the opinion of *Judge* Simonton, who tried that, as well as this case below. In refusing a new trial in the case in hand, that learned and able judge said in reference to *Cooper v. Shaeffer*: "Even the age of the insured was not dwelt upon as an element of the problem, and there was not a word of evidence as to the expectancy of life or the probable amount of annual payments to be made. Here, however, these important matters were urged as a principal ground of defense and required consideration. In our opinion they necessarily carried the case to the jury, and abundantly justified the verdict. The defendants insured a healthy man of forty-two years in the sum of \$3,000 to protect a debt of \$100. If he had merely lived out his expectancy and no longer, they would have been obliged to pay for assessments and annual dues \$2,436.32, to which, if interest be added, the amount of their investment would have been \$4,336.31. In return they would have received \$3,000, thus suffering a considerable loss. Surely to call such a transaction speculation is to misuse the word. That it happened to be profitable, because the insured died within a few years, is manifestly not to the point." This extract emphasizes the distinction between *Cooper v. Shaeffer* and the case of *Ulrich v. Reinoehl*.

The law very properly lays a mailed hand upon speculative life insurance. Of all the forms of gambling, it is one of the most objectionable. The records of our courts show that it sometimes leads to murder. The holder of a policy upon a life in which he has no interest either of a social or pecuniary nature has a strong interest in the death of the assured. This interest grows and strengthens with each payment of premium. He has made a bid upon the life of another person. A man who will engage in such a transaction cannot safely be regarded as a saint. He sees with growing impatience that life prolonged from year to year, and his money slipping away in premiums. A man thus situated soon becomes familiar with the thought of the death of the person who

stands between him and what, in his morbid fancy, he may regard as his rights. That crime follows in some instances is a fact of which courts have judicial knowledge.

All life insurance is in one sense speculative, yet within proper restrictions it has been found to be highly beneficent and not in conflict with public policy. It enables a man in the days of his early struggles to provide for his family in case of his death. It renders it possible for a business man to borrow the capital needed for success. It furnishes the means and the only means by which a creditor may sometimes secure a doubtful claim. Yet in all these cases there is the element of speculation, for if the assured dies shortly after the policy is issued, the beneficiary, whether he be a blood relation or a creditor, gets a sum of money greatly disproportioned to the amount paid. But in these cases the law does not regard the speculative element as one of danger. It is true that a son who takes out a policy on the life of his father, or a creditor upon the life of his debtor, may have an interest in the death of the assured, and resort to crime to procure it, but experience shows that such instances are extremely rare, and the temptation no greater than in thousands of other instances in which one person may be benefited pecuniarily by the death of another. But a policy taken out by one who has no interest either as a creditor or a relative in the life of the assured, is always a danger signal.

It is settled law that a creditor has an insurable interest in the life of his debtor, but up to this time there is no decision as to the limit of this right. Each case has been decided upon its own facts. In *Cooper v. Shaeffer*, as before observed, it was said the insurance was too large; in *Grant v. Kline*, on the other hand, the amount of insurance was held not disproportioned to the debt. But it is necessary to lay down some fixed rule by which such cases can be disposed of in the future, otherwise the rulings of the courts and the verdicts of juries upon such questions will be arbitrary, and where there is nothing in a case but the amount of the insurance and the amount of the debt it is impossible for either a court or a jury to arrive at a correct result.

Starting out with the conceded proposition that a creditor has an insurable interest in the life of his debtor, and may

lawfully take out a policy thereon, the court in *Ulrich v. Reinohl*, 13 L. R. A. 433, declares it follows logically that he may take out the policy in such a sum as may reasonably secure the debt. It needs no argument to show that if my debtor owes me \$1,000 a policy for \$1,000 would be inadequate, for if my debtor dies within twenty-four hours after the policy is taken out, I am a loser by the amount of the premium paid, and it would be but a few years before the interest on the debt and the premiums would exceed the debt. Every future payment then would be a loss, with the only alternative of adding to this loss year by year, or abandoning the policy altogether, and sinking the whole amount paid. It seems clear upon reason that the creditor may take out a policy in excess of his debt. But to what excess? The answer to this question obviously depends upon circumstances. An important element in the consideration of this question is the age of the assured. The difference between a policy on the life of a man of twenty-five years of age and one of seventy-five is clear to the dull-est understanding. In the above case the assured was only forty-two years of age; and his expectancy of life was twenty-six years. The chances were greatly in favor of his living out his expectancy. The Carlisle Tables were prepared with care by competent experts, and are the result of actual experience. The court, therefore, felt justified in saying that the chances were in favor of the assured living out his expectancy, in which case there would be the loss of interest on the debt for twenty-six years added to the dues and assessments, with interest thereon, for the same period. The evidence shows that in such event the defendants would have been losers by a considerable sum. In fact it is inferred from the tables furnished that after about seventeen years the defendants would have carried this policy at a loss. The defendants assumed this risk when they took out the policy. They also had the chance of the assured not living out his expectancy. This is a risk which an insurance company assumes upon every policy which it issues. In a particular instance the assured may live many years beyond his expectancy, which is a large gain to the company. But this gain is equalized by the loss in instances where the assured dies before the expiration of his expectancy, so that in the vast volume of business of such corporations the average result is reasonably uni-

form. But the holder of a single policy can have no average result. He takes the risk with the chances fairly balanced. Had he taken out one hundred policies on the lives of as many debtors, it is more than probable that some of them would have largely exceeded their expectation, while others would not have reached it. In such case there would not have been material gain or loss.

If the assured should live out his expectancy of life no question could probably arise as to the right of the holder to retain the whole of the money. It could not then be successfully assailed as a gambling transaction. But the character of the contract cannot depend upon results, or the accident of death. If not lawful in its inception it could never become so.

In order to ascertain whether an insurance is disproportioned to the debt, regard must be had to the age of the assured, his expectation of life and the cost of carrying the insurance with interest thereon, as well as upon the amount of the debt. The evidence which forms the subject of the first assignment, the court say, was not only proper, but essential, to an intelligent understanding of the case. It is just what was lacking in *Grant v. Kline*, and was one of the reasons why the court avoided deciding the broad question in that case. But anyone who reads that opinion between the lines can see that the judicial mind must have been influenced to some extent by the suggestion in reference to the Carlisle Tables.

The rule announced in *Ulrich v. Reinoehl*, *supra*, it is admitted may not be the best, but the court has not been able to find a better, after a most careful and anxious consideration of the question. That it will not produce exact justice in all cases is possible. There will always be cases of individual hardship in the application of all general rules. No general rule can be made to fit each particular case, otherwise it would cease to be a rule. Attention was especially called to this difficulty by the following extract from the opinion of the learned judge below in refusing a new trial:

"With much respect it is suggested that the principle indicated in *Grant v. Kline*, 115 Pa. 625, 7 Cent. Rep. 626, and *Cooper v. Shaef-fer* (Pa.) 9 Cent. Rep. 601, as the proper rule to determine for what sum a creditor's policy should be taken out, ought to be somewhat expanded before it is positively adopted. As now stated, it would

not provide for a case like this, where the policy is taken out in a company which levies annual (monthly?) assessments, and where therefore allowance must be made in the creditor's forecast for possible fluctuations; neither would it now provide for the not infrequent contingency of the insured outliving his expectancy. Under the present form of the indicated rule, the creditor must always lose if the debtor lives beyond his expectancy; and it cannot be accurately applied to assessment insurance, because in this variety of the business the annual payments are not a previously known and certain sum."

But the court has no difficulty in disposing of the objection that the rule does not provide for the case of the assured living beyond his expectancy and thus entailing a loss upon the creditor. If we go beyond the expectancy where are we to stop? A man may live to the age of a hundred, and such a length of days is of frequent occurrence. To sanction a policy covering such a period, and yet to allow the holder to recover the full amount in case of death within a year would be a retrograde step in the decisions. Under such a system the creditor would be absolutely secure, with the possibility of an enormous gain in case of an early death. Whereas at present, the risk of a debtor's exceeding his expectancy is equalized by the possibility of his death within it, and in a given number of cases the result produces uniformity. The want of uniformity is not the fault of the rule, but of its application to a single case.

There is more difficulty, the court admits, in the other objection. The policy in question, however, it is said, was taken out in a mutual company, where assessments are made from time to time, and there appears to have been no difficulty upon the trial below in ascertaining with sufficient accuracy the amount of assessments which the defendants would have been called upon to pay had the assured lived out his expectancy. The precise amount of such assessments cannot of course be estimated with the same accuracy as in the case of a company in which the annual premium is a fixed sum. But the assessments even in a mutual company can be approximated by the experience of other similar companies with sufficient accuracy to base an insurance upon it. And where a policy has been taken out in good faith by a creditor, the law does not

exact impossibilities. A slight mistake, one way or the other, owing to the condition of the company's business, by which assessments are increased or diminished, would not necessarily vitiate a policy. The cost of life insurance by whatever system adopted, it is believed, does not vary so greatly as to prevent a reasonable approximation thereof.

It may be that few men would take out a life policy to secure a debt of \$100, where there is an expectancy of life for twenty-six years, and pay an annual assessment or premium in excess of the whole amount of the debt. But courts do not pass upon the wisdom of contracts. They only consider their legality and care must be taken in the enforcement of an admittedly sound rule of policy not to impinge upon the right of the citizen to contract. In *Ulrich v. Reinoehl*, *supra*, the contract was lawful, and the defendants appear to have entered in not so much for their own benefit as for the accommodation of the assured. The court is not to measure its legality by its results but by its surroundings at the time it was made.

In conclusion the opinion is expressed that a creditor may lawfully take out a policy on the life of his debtor in an amount to cover the debt with interest, and the cost of such insurance with interest thereon during the period of the expectancy of life of the assured, according to the Carlisle Tables.

In some states a creditor holding a policy on the life of his debtor as security for his debt is held a trustee to the extent of the proceeds above the debt and expenses, and may be called on to account therefor by the personal representatives of the debtor.¹

A creditor who takes an assignment of a life policy as security for a loan can hold the proceeds of that policy only to the extent of the sums actually advanced by him.²

In other states in the absence of evidence that the policy was held in trust for the debtor, where the rights of the parties appear upon the face of the policy, the presumption is against such trust.³

It has been said, however, on the authority of *Goodsall v. Boldero*, 9 East, 72, that an insurance upon the life of a debtor, in

¹*Tateum v. Ross*, 150 Mass. 440.

²*Roller v. Beam*, 6 L. R. A. 136, 86 Va. 512.

³*Corson v. Garnier* (Pa.) 4 Cent. Rep. 308.

behalf of a creditor, is in legal effect but a guaranty of the debt, and if the debt is paid the insurance is at an end. But it is now settled that this case is not the law. It was directly drawn in question and was expressly overruled in *Dalby v. India & L. L. Assur. Co.*, decided in the exchequer chamber, 15 C. B. 365.

It is perhaps true that a policy in favor of a creditor is to be regarded as collateral security only where the debtor is under obligation to pay the premiums; but where the creditor pays the premiums, the right of the creditor is absolute;¹ and a creditor who insures the life of his debtor, and is obliged to keep alive the policy by paying premiums, may hold all he can recover on the policy, unless there is a gross disproportion between the debt and the amount of the policy.²

h. Future Delivery of Stocks, Grain and Produce.—The rule at common law that, "articles which had no actual or potential existence at the time of the contract, were not subjects of sale," was at one time well recognized. But it was found that this was too restrictive upon commercial transactions. The manufacturer, desiring to contract for the delivery of his product at a future date, when the purchaser would find use for it, if excluded from contracting for the raw material deliverable to him at a fixed price a sufficient time before it was to be operated upon, was compelled to purchase in the present market, and store the article until he could make it available for manufacturing purposes.

There was thus, the investment of capital without interest, the cost of storage, the hazard of decay and loss by fire or casualty, as well as loss of weight and measure, and expense of cooperage in case of fluid.

But the relaxation of the rule, so that a contract for the sale and future delivery of a commodity of a designated kind or class, which the seller does not own, or which has at the time no actual existence, but which may be supplied by purchase in the market at the proper time, or produced of material to be so acquired; enables the manufacturer to contract to sell his product at a fixed future date, for a determined price, without such investment of

¹ *Amick v. Butler*, 9 West. Rep. 845, 111 Ind. 578.

² *Rittler v. Smith*, 2 L. R. A. 844, 70 Md. 261.

capital, or cost or hazard of storage, and without risk of an advance in the raw material; having already contracted for it, deliverable at a sufficiently early date, which will enable him to comply with his contract of sale.

Such contracts are now recognized where the intent is that the commodity shall actually be procured by the seller, and supplied to the purchaser, upon the maturity of the contract of sale.

Contracts in regard to the sale and future delivery of grain and cotton were found to be equally necessary, in the interest of the farmer and planter, as well as the manufacturer and miller. As these commodities come upon the market at annual periods in immense quantities, exceeding the present demand of the manufacturer or miller, it produces corresponding "gluts" in the market.

Both the capital and the storage capacity of the individual millers and manufacturers were limited, and if the necessity existed to make present purchases for immediate delivery, the price of grain or cotton was inevitably depressed by the enormous supply demanding immediate payment and storage.

It was found necessary, therefore, in these cases also to relax the rule, and permit the farmer and planter to sell by sample, contracting for future delivery at specified dates;¹ and the law is now everywhere recognized that an executory contract for the sale of goods for future delivery is not infected with the quality of a wager by reason of the fact that at the date of a contract the vendor had not the goods; had not entered into any arrangement to provide them, and had no expectation of acquiring them, unless by a subsequent purchase in the market;² and it is equally true that a bona fide purchase of grain for speculation, though it be for future delivery, is as legitimate as a purchase for actual use.³

So executory contracts for the sale of stock may be made with

¹*Edwards v. Hoeffinghoff*, 38 Fed. Rep. 635; *Conner v. Robertson*, 37 La. Ann. 814; *Irwin v. Wilkier*, 110 U. S. 499-508, 28 L. ed. 225-229; *Cobb v. Prell*, 15 Fed. Rep. 774, 22 Am. L. Reg. N. S. 609, and note; *Crawford v. Harlow*, 10 West. Rep. 78, 92 Mo. 439, 1 Am. St. Rep. 745, and note; *Ex parte Young*, 6 Biss. 58; *Pickering v. Cease*, 79 Ill. 328; *Cockrell v. Thompson*, 85 Mo. 510; *White v. Barber*, 123 U. S. 392, 31 L. ed. 243.

²*Conner v. Robertson*, 37 La. Ann. 814.

³*Edwards v. Hoeffinghoff*, 38 Fed. Rep. 635.

an intent to actually deliver the stock, and at common law, they are legal and valid.¹

Such [contracts, although entered into for pure purposes of speculation, however censurable, are, nevertheless, not prohibited by law unless, as in some states, by special statute; even though the seller has not the goods nor any other means of getting them than to go into the market and buy them.²

The law is now well settled that the sale of goods to be delivered in the future is valid. Such a contract is valid, although there is an option as to the time of delivery and though the seller has no other means of acquiring than to go upon the market and order them; but if, under the guise of such a contract, valid on its face, the real purpose and intention of the parties is merely to speculate on the rise or fall of prices, and the goods are not to be delivered, but the difference between the contracts and market price only paid, then the transaction is a wager, and the contract is void. It is not enough, however, to render the contract void that only one party intends by it a speculation in prices; it must be shown that both parties did not intend a delivery of the goods, but contemplated and intended a settlement only of differences. The burden of showing the invalidity of the contract rests upon the party asserting it.³

This is the law of England since the Statute of 8 and 9 Vict. chap. 109, § 18.⁴

¹*Irwin v. Williar*, 110 U. S. 499, 508, 28 L. ed. 225, 229; *Cook, Stock and Stockholders*, 352-361.

²*Smith v. Bouvier*, 70 Pa. 325; *Kirkpatrick v. Bonsall*, 73 Pa. 155; *Hatch v. Douglas*, 48 Conn. 116; *Flagg v. Baldwin*, 38 N. J. Eq. 219; *Kent v. Miltenberger*, 18 Mo. App. 503.

³*Clarks v. Foss*, 7 Biss. 540.

⁴*Cockrell v. Thompson*, 85 Mo. 510; *Crawford v. Harlow*, 10 West. Rep. 78, 92 Mo. 489; *White v. Barber*, 123 U. S. 392, 31 L. ed. 243; *Mutual L. Ins. Co. v. Watson*, 30 Fed. Rep. 653; *Ward v. Vosburgh*, 81 Fed. Rep. 12; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225; *Ex parte Young*, 6 Biss. 53; *Pickering v. Cease*, 79 Ill. 328; *Lyon v. Culbertson*, 83 Ill. 38; *Cassard v. Hinman*, 1 Bosw. 207, 6 Bosw. 8; *Brus's App.* 55 Pa. 294; *Waterman v. Buckland*, 1 Mo. App. 45; *Rudolf v. Winters*, 7 Neb. 125; *Swartz's App.* 3 Brewst. 131; *Gregory v. Wendell*, 39 Mich. 337, 40 Mich. 432; *Yerkes v. Salomon*, 11 Hun, 471; *Cockrell v. Thompson*, 85 Mo. 510; *Melchert v. American U. Tele. Co.* 11 Fed. Rep. 193.

⁵*Grizewood v. Blane*, 11 C. B. 538.

Where the parties intend to speculate upon the future market and to settle the profit or loss upon the differences, there can be no recovery.'

In Iowa and in Maine the same doctrine is held.'

Losses sustained by buying and selling what is commonly called "futures," cannot be recovered in a court of law.'

While the courts recognize the legitimacy of these transactions, both in the raw material for manufacturing, and in stock transactions, yet, where the form of a future sale is resorted to, the real purpose and intention of the parties being merely to speculate on the rise and fall of the prices, and the goods are not to be delivered, but the difference between the contract and market price only to be paid, then the transaction is a wager, and the contract will not be enforced.

A contract with a broker to purchase "cotton futures" on a margin, by which the purchase or delivery of actual cotton is not contemplated by either party, but the settlement is to be made between the parties by one party paying the other the difference between the contract price and the market price of such "cotton future," according to the fluctuations in the market,—is a wagering contract.'

Where the real intent is, that no property shall pass, but mere differences in price, between the value at the date of the contract and the time stipulated for delivery shall be paid, no matter how formal the contract of sale may be, it is a mere wager and void.'

¹*Cobb v. Prell*, 15 Fed. Rep. 774.

²*First Nat. Bank v. Oskaloosa Packing Co.* 66 Iowa, 44; *Rumsey v. Berry*, 65 Me. 570.

³*Lawton v. Blitch*, 83 Ga. 668.

⁴*Sterling v. Jordan*, 48 Barb. 459; *Richter v. Frank*, 41 Fed. Rep. 859; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225.

⁵*Embrey v. Jemison*, 181 U. S. 386, 38 L. ed. 173.

⁶*Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225; *Mutual L. Ins. Co. of New York v. Watson*, 30 Fed. Rep. 653; *Melchert v. American U. Teleg. Co.* 3 McCrary, 531; *Re Green*, 7 Biss. 338; *Ex parte Young*, 6 Biss. 53; *Cobb v. Prell*, 15 Fed. Rep. 774; *Sawyer v. Taggart*, 14 Bush, 727; *Kirkpatrick v. Bonsall*, 72 Pa. 155; *North v. Phillips*, 89 Pa. 250; *Thompson's Estate*, 15 Phila. 532; *Bigelow v. Benedict*, 70 N. Y. 202; *Gregory v. Wendell*, 39 Mich. 337; *Lyon v. Culbertson*, 83 Ill. 33, 38; *Beadles v. McElrath*, 85 Ky. 230; *Cockrell v. Thompson*, 85 Mo. 510; *Cunningham v. Augusta Nat. Bank*, 71 Ga. 400; *Rudolf v. Winter*, 7 Neb. 125; *Rumsey v. Berry*, 65 Me. 570; *Heman v. Hardie*, 12 Ct. of Sess. Cas. (S. C.) 406; *Seeligson v. Lewis*, 65 Tex. 215; *Lowry v. Dillman*, 59 Wis. 197; *Crawford v. Harlow*, 10 West. Rep. 78, 92 Mo. 498;

But the intention of one party to settle by payment of difference in value between the dates will not render the contract void if the other party has contracted, intending to execute the contract legally.¹

Where one of the parties has purchased stock on a margin, an agreement to share profits or losses on sale of the stock is not illegal as a wager or stock-jobbing contract.²

The fact that the vendor does not then own the property will not render its sale for future delivery a wager or void contract, unless it was intended by both parties as a mere speculation on the future price.³

It is not enough to render the contract void, that only one party intends by it a speculation in prices. It must be shown that neither party intends a delivery of the goods, but contemplates and intends a settlement only, of differences.⁴

Where there is a mutual intent that the purchase shall never be consummated, that there shall be no delivery, and that the transaction shall be merely a gambling or wagering transaction, to win or lose money according to the advance or decrease of the price of the article, the contract is invalid as a gambling contract. But an intention of one of the parties only that it shall be a gambling transaction will not make it so,⁵ if the other party acts in good faith, and carries out the contract by buying and selling as instructed, and renders himself liable.⁶

A broker who makes a valid contract knowing that his principal intends a wager, and who at his principal's directions, pays the

First Nat. Bank of Lyons v. Oskaloosa Packing Co. 66 Iowa, 41; *Flagg v. Baldwin*, 88 N. J. Eq. 219; *Lowe v. Young*, 59 Iowa, 364; *McGrew v. City Produce Exch.* 85 Tenn. 572; *Dunn v. Bell*, 85 Tenn. 581; *Floyd v. Patterson*, 72 Tex. 202; *Davis v. Davis*, 119 Ind. 511; *Kahn v. Walton*, 46 Ohio St. 195; *Beadles v. McElrath*, 85 Ky. 230; *Embry v. Jemison*, 181 U. S. 336, 38 L. ed. 172.

¹*Bartlett v. Smith*, 4 McCrary, 388; *Clarks v. Foss*, 7 Biss. 540; *Sawyer v. Taggart*, 14 Bush, 727; *Wall v. Schneider*, 59 Wis. 352; *Murray v. Ocheltree*, 59 Iowa, 435; *Pizley v. Boynton*, 79 Ill. 351.

²*Bullard v. Smith*, 139 Mass. 492.

³*Conner v. Robertson*, 37 La. Ann. 814, 55 Am. Rep. 521; *Bangs v. Hornick*, 30 Fed. Rep. 97.

⁴*Sondheim v. Gilbert*, 5 L. R. A. 432, 117 Ind. 71.

⁵*Benson v. Morgan*, 25 Ill. App. 22; *Jones v. Shale*, 84 Mo. App. 302; *Carroll v. Holmes*, 24 Ill. App. 453.

⁶*Eduards v. Hoeffinghoff*, 38 Fed. Rep. 635.

money in closing it out, can recover the money paid and commissions.¹

In transactions upon the stock exchanges, where the sale of futures in stock securities are contemplated, there have grown up various forms of contracts in sellers' or buyers' "options," which are designated by appropriate names. Among these are what are styled "puts" and "calls." A "put" being the privilege, for a certain consideration, of delivering, or not delivering, personalty within a certain time at a specified price. The person who makes such a contract and receives the consideration, contracts that he will accept and pay for the specified articles. A "call" is the privilege of calling or not calling for the subject matter of the contract.

The one receiving the consideration agrees to deliver, at the option of the party to whom it is given or his order, at a time named, certain stocks, securities or goods, at a certain price. "Puts" and "calls" are merely options to sell or buy.²

The true idea of an option is impressed within the terms "puts" and "calls," the former being the privilege of delivering or not delivering the thing sold; the latter, being the privilege of calling or not calling for the thing bought.³

A contract for the sale of corporate stock to be delivered at the expiration of twelve months, with the seller's option to deliver at any time during that period, is *prima facie* valid, and not founded on a gambling consideration so as to render it void under Ala. Code, § 1742.⁴

A contract reciting that for a certain consideration one agrees to sell to another certain stock for a certain sum, "if taken on or before" a certain future day, is a contract to give the latter the option to buy stock at a future time.⁵

Where the double privilege of a "put" and "call" is given, securing to the holder the right to demand of the seller at an agreed price, within given time, a certain number of shares of specified stock, or to require him to take within the time, the

¹*Taylor v. Penquite*, 35 Mo. App. 389.

²*Fitzley v. Boynton*, 79 Ill. 353.

³*Pearce v. Foote*, 118 Ill. 234.

⁴*Wolffe v. Perryman*, — Ala. —, 9 S. Rep. 148.

⁵*Schneider v. Turner*, 6 L. R. A. 164, 180 Ill. 28.

same shares of stock, it is called a "straddle" or "spread eagle." The form of the latter, is usually:

New York,....., 1892.

For value received, the bearer may call on the undersigned, for.....shares of common stock, of the..... Co., at.....per cent, at any time in days from date. Or, the bearer may, at his option, deliver the same to the undersigned, at.....per cent, any time within the period named. All dividends and extra dividends declared within the time, are to go with the stock in either case, and this instrument is to be surrendered upon the stock being either called or delivered.

Expires,.....

.....

A "call" is contained in the first clause of this agreement, and a "put" in the second. Under the "call" the bearer is entitled to all dividends or extra dividends declared during the time, which fact is specified in the "call." Whereas, in the "put," the one who agrees to receive, is entitled to all dividends or extra dividends declared during the time. No fictitious sales of stock can be made under the rules, but actual delivery of stock must be made.

An "option," "put," "call," "straddle," or other similar stock exchange contract may be made with an intent to actually deliver the stock, and, if so, is unobjectionable and is enforceable.¹

The question for the jury to determine is whether the contracts made on the board of trade were valid, or whether they were pure options, that is, "puts" and "calls," or agreements, whereby one party pays another for the privilege of delivering to him or not a certain kind of merchandise at a future time at a certain price.²

¹*Harris v. Tumbridge*, 88 N. Y. 95.

²*Bigelow v. Benedict*, 70 N. Y. 202; *Harris v. Tumbridge*, 88 N. Y. 92; *Story v. Saloman*, 71 N. Y. 420; *Ex parte Young*, 8 Biss. 53; *Webster v. Sturges*, 7 Ill. App. 560; *Tenney v. Foote*, 4 Ill. App. 594; *Lyon v. Culbertson*, 83 Ill. 33; *Gilbert v. Gaugar*, 8 Biss. 214; *Mazlon v. Gheen*, 75 Pa. 166; *Hess v. Rau*, 95 N. Y. 359; *Knowlton v. Fitch*, 53 N. Y. 288; *White v. Smith*, 54 N. Y. 522; *Cameron v. Durkheim*, 55 N. Y. 425; *Third Nat. Bank v. Harrison*, 10 Fed. Rep. 243.

³*White v. Barber*, 123 U. S. 392, 409, 31 L. ed. 243, 249.

An agreement by the seller of stock to repurchase it at the end of three years for a sum equal to the original purchase price, with simple interest at 10 per cent, is not a gambling contract, under Ill. Rev. Stat., chap. 38, § 130, making it a penal offense to give an option to sell or buy stock, etc., at a future time.¹ But an agreement to make a "corner" in stock, by buying it up so as to control the market and then purchasing for future deliveries, is illegal.²

On the Cotton Exchange, the transaction not contemplating present delivery, is called a "future." A contract with a broker to purchase for defendant "cotton futures" on a margin, by which the purchase or delivery of actual cotton was never contemplated by either party, but the settlement was to be made between the parties by one party paying to the other the difference between the contract price and the market price of said cotton futures, according to the fluctuations in the market,—is a wagering contract and void.³

In the Produce Exchange, the "option" is as to the day when the delivery may be made or demanded. On the Cotton Exchange, all stipulations or understandings that no actual delivery of cotton is to be made are forbidden. The rules provide, that deliveries of cotton shall be made in this manner: The seller must give written notice to the buyer that he will deliver on a day named. If the seller has resold the goods, he passes the notice to his vendee, accompanied with a transferable order, and so on, until it reaches a vendee who has not sold. The seller must then deliver to this buyer, an order on a warehouse or place of delivery before 1½ M. of the day preceding that on which the delivery is due; if the buyer has not resold, he is bound to present the order and receive and pay for the goods. If he has sold, he passes the order to his vendee, and so on until it reaches a vendee who has not sold, and he is bound to receive and pay for the goods at the original contract price; the difference between that price and that of each subsequent sale being settled between the immediate par-

¹*Richter v. Frank*, 41 Fed. Rep. 859, 8 Ry. & Corp. L. J. 86.

²*Sampson v. Shaw*, 101 Mass. 145; *Raymond v. Leavitt*, 46 Mich. 447, 18 Cent. L. J. 110; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558.

³*Embrey v. Jemison*, 181 U. S. 386, 38 L. ed. 172.

ties to each sale. Delivery orders must be received by any member of the exchange, to whom goods of the kind called for are due from another member. The equivalent of this system exists in most exchanges.

Among London bankers settlements are effected each day, through what is called the "Clearing House" through a committee appointed by the bankers. Each house transmits, during the day, the checks and bills which it receives on the others, and keeps a note of the obligations coming against itself. Accounts are closed at 4 o'clock in the afternoon. The bills and checks are classified at the "Clearing House" and at a later hour the accounts are adjusted; each bank paying or receiving the balance due by or to it.

The same system is adopted by the New York banks. And this system has been applied in the various stock exchanges, where the agency of a trust company is generally employed to adjust mutual accounts of the members of the exchange, who agree that deliveries shall be made under the superintendence of such trust company; deliveries being settled by delivery orders or certificates. This method of delivery by warehouse receipts, certificates or delivery orders has been recognized in the courts.¹

Many transactions are however settled outside the clearing houses. Take a transaction when a commission merchant is acting for two dealers. He sells, for present or future delivery, grain at 30 cents a bushel to A, while the latter has sold a like amount for 40 cents a bushel to B. And B it turns out has sold the same quantity for delivery to the commission merchant at 60 cents. Now, when the commission merchant on demand receives the grain from his principal, he delivers it to A, and receives the 30 cents per bushel. A delivers it to B and collects the 40 cents due, and B in turn delivers it to the commission merchant, and receives 60 cents per bushel, and then settles with his second principal and collects the 60 cents per bushel from him. On these transactions he charges his commissions.

If the details of this transaction are not literally worked out, the commission merchant will simply deliver the grain, or rather the warehouse receipt received from his first principal to his

¹*Sawyer v. Taggart*, 14 Bush, 727; *Wall v. Schneider*, 59 Wis. 352; *Gregory v. Wendell*, 89 Mich. 337.

second principal, and pay to A 10 cents per bushel, and to B 20 cents per bushel, the amount of advance accruing to each, dispensing with the intermediate deliveries. This is styled "a ring" and the completion or settlement of the transaction a "ringing out." This method is used in settling accounts between commission merchants, where one has sold for one customer, and purchased a like amount, for an identical delivery, for another, dealing with some other commission merchant, who has been acting for other investors. This method of settlement cannot be enforced against the customers (unless they be held chargeable with knowledge of an existing rule), as they may demand the actual delivery of the grain, and thus defeat a "ring" settlement.

To meet the difficulty that a commission merchant may be "rung out" in a genuine transaction, where he has contracted to deliver the actual cotton to a particular customer, who desires to enforce the contract, the New York Cotton Exchange has adopted a new rule, declaring that all orders for future delivery transactions in cotton are understood to permit the commission merchant to substitute other contracts for like delivery, for contracts which have been "rung out," and this he may do without notification to his principal. As the commission merchant guarantees the contract personally, this can work no wrong to the customer, who is never known in the transaction except to his commission merchant, and who relies entirely on the broker and not on the party to the contract, who is unknown to him. The rule of the New York Cotton Exchange, enforces this "ring" method of settlement among its members, when any of them are found in a ring of contracts. Many of the stock exchanges, some of them in compliance with statute enactments, and some under their rules, require settlements through a clearing house.

It has been said that "ring" settlements are valid.¹ These settlements are but giving practical effect to the clearing house method, and it has been held, that the rule of a board of trade, where cross trades exist between the commission merchants under such circumstances that they can be canceled, that shall be done

¹*Clarke v. Foss*, 7 Biss. 540; *Kent v. Miltzenberger*, 18 Mo. App. 503; *Ward v. Voeburg*, 81 Fed. Rep. 12; *Oldershaw v. Knoles*, 4 Ill. App. 63, 6 Ill. App. 825; *Williar v. Irwin*, 11 Biss. 57; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 235.

and the one shall be offset for the other, and a new contract shall be substituted must be known to a party, to be binding on him; but the knowledge of his broker is the knowledge of himself.¹

The rules and regulations adopted by the New Orleans Cotton Exchange in the settlement and substitution of contracts for the future delivery of cotton, when not used to promote a gambling transaction, are valid and legal, and are binding upon all persons familiar with such rules and regulations, or chargeable with knowledge thereof, when they employ members of said exchange to buy or sell, on the floor of said exchange, cotton for future delivery, who in good faith buy and sell in accordance with the said rules and regulations.²

Settlements of bona fide contracts for the sale of actual wheat by offsets, under the rules and regulations of a board of trade, do not affect the validity of the contract if the original intent was to purchase and receive the actual wheat.³

In the stock exchanges the call by either party for a margin of 10 per cent, and keeping this margin good, when from fluctuations in the stock it is reduced below 5 per cent is authorized. So in produce exchanges the margin rate is fixed specially, upon various grains and upon pork, lard, etc. Upon this question the courts have ruled that if a contract for the future delivery is lawful, the putting up of margins to cover losses which may accrue from fluctuations in prices does not render it an unlawful transaction.⁴

The burden of showing that no actual contract was contemplated, but a mere wager upon a future price of the commodities, rests upon the party asserting it.⁵ But where doubt is cast upon

¹*Edwards v. Hoeflinghoff*, 38 Fed. Rep. 635.

²*Lehman v. Feld*, 37 Fed. Rep. 852.

³*Ware v. Jordan*, 25 Ill. App. 534; *Boyd v. Hanson*, 41 Fed. Rep. 174.

⁴*Boyd v. Hanson*, 41 Fed. Rep. 174; *Sondheim v. Gilbert*, 5 L. R. A. 432, 117 Ind. 71; *Cockrell v. Thompson*, 85 Mo. 510; *Wall v. Schneider*, 59 Wis. 352; *Gregory v. Wendell*, 39 Mich. 337; *Union Nat. Bank of Chicago v. Curr*, 15 Fed. Rep. 433; *Whitesides v. Hunt*, 97 Ind. 191; *Jones v. Marks*, 40 Ill. 313; *Lassen v. Mitchell*, 41 Ill. 101; *Sawyer v. Taggart*, 14 Bush, 727; *Rumsey v. Berry*, 65 Me. 570; *Bartlett v. Smith*, 18 Fed. Rep. 263.

⁵*Harris v. Tumbidge*, 83 N. Y. 92; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225; *Whitesides v. Hunt*, 97 Ind. 191; *Rumsey v. Berry*, 65 Me. 570; *Wing v. Glick*, 56 Iowa, 473; *Sawyer v. Taggart*, 14 Bush, 727; *Gregory v. Wendell*, 39 Mich. 337; *Williams v. Tiedemann*, 6 Mo. App. 369; *Murray v. Ocheltree*, 59 Iowa, 435; *Kent v. Millenberger*, 18 Mo. App. 503.

the validity of a contract for the sale of grain, by the testimony, it rests upon the party claiming any rights under it to make it satisfactory and affirmatively appear that the contract was made with the intention to deliver the grain.¹

Where the statutes forbid short sales of stock, the seller, to enforce his contract, must show he was the owner at the time of sale.²

By the common law of England, wagers respecting matters which involve neither scandal nor matters inimical to good order were lawful; but the common law on this subject has never been adopted in most of the states, not harmonizing with colonial policy.³

Generally, in this country, all wagering contracts are treated as illegal and void, as being against public policy.⁴

In England, since the statutes of 8 and 9 Vict., chap. 109, § 18, a contract in the form of a future sale of stocks, where neither party contemplated a real transaction, but simply intended to settle differences, is held a gambling transaction and not enforceable.⁵

In *Thacker v. Hardy*, L. R. 4 Q. B. Div. 685, the court found that the plaintiff was employed to make contracts, and ruled that the understanding between the plaintiff and his customer, that the contract should be so managed that only differences in prices should be paid, did not violate this statute. Lindley, J., in giving the opinion at the trial, said: "What the plaintiff was employed to do, was to buy and sell in the stock exchange, and this he did; and everything he did was perfectly legal, unless it

¹*Sprague v. Warren*, 8 L. R. A. 679, 26 Neb. 326. See *Cobb v. Prell*, 15 Fed. Rep. 774; *Barnard v. Backhaus*, 52 Wis. 598; *Beveridge v. Hewitt*, 8 Ill. App. 467.

²*Stebbins v. Leowolf*, 8 Cush. 137.

³*Loce v. Harvey*, 114 Mass. 80. See *Ball v. Gilbert*, 12 Met. 399; *Lewis v. Littlefield*, 15 Me. 238; *Perkins v. Eaton*, 8 N. H. 152; *Hoit v. Hodge*, 6 N. H. 104; *Collamer v. Day*, 2 Vt. 144; *West v. Holmes*, 26 Vt. 530; *Stoddard v. Martin*, 1 R. I. 1; *Wheeler v. Spencer*, 15 Conn. 28; *Edgell v. M'Laughlin*, 6 Wart. 176; *Rice v. Gist*, 1 Strobb. L. 82; *Bigelow v. Benedict*, 70 N. Y. 202; *Harris v. Tumbridge*, 83 N. Y. 92; 8 Kent, Com. 277, 278; Metcalf, Cont. (Heard's ed.) 277.

⁴*Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225; *Grant v. Hamilton*, 8 McLean, 100. See, however, *Preston v. Cincinnati, O. & H. V. R. Co.* 36 Fed. Rep. 54.

⁵*Grisewood v. Blane*, 11 C. B. 526.

was rendered illegal as between the defendant and himself, by reason of the illegality of the object they had in view, or of the transaction in which they were engaged. Now, if gaming and wagering were illegal, I should be of the opinion that the illegality of the transaction would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming, in a court of law, any indemnity from the defendant in respect of the liabilities he had incurred.¹ But it has been held that, although gaming and wagering contracts cannot be enforced, they are not illegal. *Fitch v. Jones*, 5 El. & Bl. 238, is plain to that effect."

On appeal Brett, *L. J.*, said: "It was further suggested in *Cooper v. Neil*, Weekly Notes, June 1, 1878, that the agreement was that, although the plaintiff, being broker to the defendant, but contracting in his own person as principal, should enter into real bargains, yet the defendant should be called upon only to pay the loss if the market should be unfavorable, and should receive only the profit if it proved favorable; and that no further liability should accrue to the principal whatever might become of the broker upon the stock exchange; so that, as regarded the real principal, the defendant in the action, it should be a mere gambling transaction. I then considered that a transaction of that kind might fall within the provisions of 8 and 9 Vict., chap. 109, § 18, but I thought that there was no evidence of it. And with respect to the present action I say that there is no evidence that the bargain between the parties amounted to a transaction of that nature. I retract nothing from what I said in that case."

In England wagering contracts concerning stocks or merchandise are not void at common law, and all the judges in *Thacker v. Hardy* were of opinion that the facts in that case did not show that the transactions between the parties were in violation of the statute.

In *Irwin v. Williar*, 110 U. S. 499, 510, 28 L. ed. 225, 230, the Supreme Court of the United States says of wagering contracts, that "in England it is held that the contracts, although wagers, were not void at common law, and that the statute has not made

¹*Cannan v. Bryce*, 3 Barn. & Ald. 179; *M'Kinnell v. Robinson*, 8 Mees. & W. 434; *Lyne v. Siegfeld*, 1 Hurlst. & N. 278.

them illegal, but only non-enforceable; while generally in this country all wagering contracts are held to be illegal and void as against public policy.¹

In the various states there has been much experimental legislation aimed at gambling in stocks, and creating artificial corners in the grain and produce market.

In Alabama, the code section 1742 is not construed so as to render void a sale of stock of a corporation deliverable a year from date, with an option to deliver at any earlier date that the purchaser may choose.²

In Arkansas, the Act of March 30, 1883, to prohibit dealing in futures, is not in restraint of trade. It does not prevent contracts for future delivery when entered into in good faith and with an actual intention of fulfillment, but is intended to suppress mere speculations upon chances, where the grain, cotton, or stocks dealt in exist only in imagination, and where no delivery is contemplated, but the parties expect to settle upon the difference in the market. The written contracts for future purchase and delivery are not conclusive upon the question of good faith. The real question always is, Did the parties intend an actual, bona fide sale, or a wager? One who acts as a broker in dealing in futures is *particeps criminis* and punishable as principal. An indictment for dealing in futures, in the language of the statute, is sufficient.³

In California a purchase of stock by a broker for his customer, who puts up a margin, and, aside from commissions and interest, simply receives or pays the difference between the buying and selling values, is invalid under Cal. Const., art. 4, § 26, as a sale of stock on margin, and can give the broker no right to enforce the customer's indebtedness to him thereon.⁴ But a wager upon indifferent matters, not involving questions of morality or police, is valid.⁵ And this is true in Delaware also.⁶ In Connecticut

¹*Dickson v. Thomas*, 97 Pa. 278; *Gregory v. Wendell*, 40 Mich. 434; *Lyon v. Culbertson*, 88 Ill. 83; *Melchert v. American U. Teleg. Co.* 3 McCrary, 521, 11 Fed. Rep. 193, and note; *Barnard v. Backhaus*, 52 Wis. 598; *Kingsburg v. Kirwan*, 77 N. Y. 612; *Story v. Salomon*, 71 N. Y. 420; *Love v. Harvey*, 114 Mass. 80.

²*Wolfe v. Perryman*, — Ala. —, 9 So. Rep. 148.

³*Fortenbury v. State*, 47 Ark. 188.

⁴*Cashman v. Root*, 12 L. R. A. 511, 89 Cal. 373.

⁵*Johnston v. Russell*, 37 Cal. 670.

⁶*Devees v. Miller*, 5 Harr. (Del.) 847.

a contract to be discharged by payment of differences is invalid.¹

In Georgia, by statute, a sale of goods to be delivered at a future day, where both parties are aware the seller expects to purchase himself to make the delivery, and no skill, labor or expense enters into the consideration, but the same is a pure speculation, cannot be enforced by either party. Code, § 2636.

Contracts for the purchase and sale of cotton futures are gaming contracts, and immoral, illegal, and contrary to public policy; and all evidences of debt executed on such a consideration are void in the hands of any person, even though it be a bona fide purchaser before due and without notice.² Losses sustained by buying and selling what is commonly called "futures" cannot be recovered in a court of law.³

In Illinois, wagers are not prohibited generally.⁴ But when a contract is precisely within the letter and spirit of the statute against wagers it is void, without regard to the question of intent.⁵ Neither party to a partnership venture in the business of making books on horse races in violation of law can obtain the aid of the court for the purpose of securing his share of the funds in the other's hands. Money advanced, either as a loan or on joint account, to be bet on a horse race cannot be recovered.⁶ A sale or purchase of actual wheat for future delivery is not invalid under the Illinois statute against option contracts.⁷ An option as to time of delivery is not prohibited.⁸

But the purchase of 150 cars of coal, with a privilege of taking 250 cars more, is void as to the 250 cars as a wagering contract under the statute making illegal an option to buy or sell at a future time any grain or commodity.⁹

An agreement to satisfy a contract by adjustment of differences

¹*Hatch v. Douglas*, 48 Conn. 116.

²*Augusta Nat. Bank v. Cunningham*, 75 Ga. 366.

³*Lawton v. Blüch*, 83 Ga. 663.

⁴*Morgan v. Pettit*, 4 Ill. 529.

⁵*Schneider v. Turner*, 27 Ill. App. 220, aff'd in 6 L. R. A. 164, 130 Ill. 28.

⁶*Shaffner v. Pinchback*, 133 Ill. 410, aff'g 30 Ill. App. 355.

⁷*Boyd v. Hanson*, 41 Fed. Rep. 174.

⁸*Miller v. Bensley*, 20 Ill. App. 528.

⁹*Osgood v. Bauder*, 75 Iowa, 550.

between the contract and the market price is not necessary to make an agreement void as an option contract under Ill. Crim. Code, § 130. And a contract for a sale of stock, "if taken on or before" a certain day, is void as an option contract, under such Code, although it would not be void at common law.¹ Where no delivery is intended the contract is illegal.²

In Indiana where a commodity is bought for future delivery, no matter what the contract is, if it is mutually understood and intended that the purchaser shall pay for and the seller shall deliver the commodity at the maturity of the contract, the contract is legal and valid; and the fact that the purchaser is required to deposit a margin and increase the same at any time the market requires it, in order to receive payment at maturity, or that the seller shall deposit a margin in order to secure delivery, does not vitiate the contract. But if such a contract does not intend future payment and delivery, but only loss or gain of the margins, it is illegal and void as a gambling contract.³

If under the guise of a contract which has the appearance of validity upon its face, the real intention is merely to speculate on the rise or fall of the market, without any purpose that any property shall be delivered or received, but with the understanding that at the appointed time the account is to be adjusted by paying or receiving the difference between the contract and the current price, then the whole transaction is illegal, as against public policy, and falls under the condemnation of the law.⁴

It is said in *Sondheim v. Gilbert*, that in order to uphold a judgment which invalidates commercial paper in the hands of innocent holders, it is essential that a statute should be shown governing the case, which in direct terms declares that transactions on which the paper is based, are unlawful, and that notes given under the circumstances exhibited by the facts are absolutely void. The principle may be considered as well established that when a statute in express terms pronounces contracts, notes, bills, securities and the like, resulting from or growing out of wagering

¹*Schneider v. Turner*, 6 L. R. A. 164, 180 Ill. 28.

²*Brown v. Alexander*, 29 Ill. App. 626; *Coffman v. Young*, 20 Ill. App. 76.

³*Davis v. Davis*, 119 Ind. 511.

⁴*Sondheim v. Gilbert*, 5 L. R. A. 433, 117 Ind. 71; *Whitesides v. Hunt*, 97 Ind. 191.

or gambling transactions, which are prohibited by statute, absolutely void, no recovery can be had thereon; and the doctrine that transactions which a statute in direct terms declares to be unlawful cannot acquire validity by the transfer of commercial paper based thereon, which is also under direct legislative denunciation, is fully supported by authority.¹

In such a case the note will be declared void in the hands of an innocent holder, in pursuance of the peremptory words of a statute which embraces in its terms the contract or obligation under consideration.²

The authorities justify the statement that a defendant may insist upon the illegality of the contract or consideration, notwithstanding the note in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the Legislature that the illegality insisted upon shall make the security, whether contract, bill or note, void; but unless the Legislature has so declared, then, no matter how illegal or immoral the consideration may be, a commercial note, in the hands of an innocent holder for value, will be held valid and enforceable.³

Where the facts make it clear that the transactions contemplated were not the actual purchase and acceptance of cotton, but were speculative wagers upon the price of that commodity, from time to time, as it might be quoted on the New York Cotton Exchange, the agreement is to engage in mere wild speculation, in the nature of gambling or wagering upon the fluctuations in the price of cotton. Such transactions demoralize and embarrass legitimate trade, and are subversive of all correct business principles, destructive of commercial integrity and morality, and result, directly or indirectly, in most of the bankruptcies, defalcations and forgeries which startle and distract business circles. Between the parties to such a transaction, and all others who participate in the specific illegal design, with the intention of aiding in its exe-

¹*New v. Walker*, 6 West. Rep. 869, 109 Ind. 355; *Thompson v. Bowie*, 71 U. S. 4 Wall. 463, 18 L. ed. 423; *Vallett v. Parker*, 6 Wend. 615; 1 Daniel, Neg. Inst. §§ 197, 807.

²*Eagle v. Kohn*, 84 Ill. 292.

³*Hatch v. Burroughs*, 1 Woods, 439; *Eagle v. Kohn*, 84 Ill. 292; *Third Bank v. Tinsley*, 11 Mo. App. 498; *Third Nat. Bank v. Harrison*, 3 McCrary, 816, 10 Fed. Rep. 243; *Edwards v. Dick*, 4 Barn. & Ald. 212; *Day v. Stuart*, 6 Bing. 109; *Chitty, Bills*, 402; 2 Randolph, Com. Paper, § 511.

cution, so as to become principals or accessories thereto, any contract or other security resulting therefrom will be wholly invalid. But in the absence of a statute in direct terms prohibiting transactions of the character, and declaring them unlawful, or expressly declaring promissory notes growing out of such a transaction invalid, while the courts will, on general common law principles, declare such notes invalid between the parties and those who were accessory to the illegal act, yet, in order to invalidate a note or other security in the hands of one who advanced money which the borrower intended to and did employ in carrying on an illegal enterprise, it has been held that it was not enough to defeat a recovery that the lender knew the borrower's purpose. He must have been in some way implicated as a confederate in the specific illegal design under contemplation. It must have been a part of the contract, or there must have been in some way such a combination of intention between the lender and borrower that the money furnished should be used in aid of and to promote the unlawful enterprise, that they became *particeps criminis*.¹

Thus it was held in *Bickel v. Sheets*, 24 Ind. 1, that a contract for the sale of property which the purchaser intended to use for gaming purposes, in violation of a statute, was not void, although the seller was informed at the time of the sale of the purpose for which the property was to be applied.² There must be knowledge of and participation in the illegal or immoral purpose.

It would be an unwarranted perversion of common and correct speech to hold that the consideration of a note which had been executed in order to obtain money with which to purchase options, or to put up as margins in cotton speculations, was money won by playing at a game, or by betting on the hands of others who do play, or to repay money lent at the time and place of such play. However much dealing in options may resemble gambling or betting, and demoralizing and pernicious as it may be, it cannot with any degree of propriety be said to be winning or losing money by playing at or betting upon any game within the meaning of the

¹*Tyler v. Carlisle*, 4 New Eng. Rep. 409, 79 Me. 219; *Waugh v. Beck*, 5 Cent. Rep. 536, 114 Pa. 422; *Tracy v. Talmage*, 14 N. Y. 162; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558.

²*Cummings v. Henry*, 10 Ind. 109; *Feineman v. Sachs*, 88 Kan. 621; *Samuel Bowman Distilling Co. v. Nutt*, 84 Kan. 724; *Fisher v. Lord*, 2 New Eng. Rep. 285, 68 N. H. 514; *Parsons Oil Co. v. Boyett*, 44 Ark. 230.

statute. Statutes involving penal consequences cannot be extended by construction so as to include acts not in terms forbidden, merely because of their resemblance to the acts prohibited, or because they may be equally demoralizing and injurious.¹

The statutes against gaming, which render all wagers, bets and stakes unlawful, and avoid all contracts for or on account of any money wagered or bet, or any notes or other securities, when the whole or any part of the consideration thereof shall be for money won or lost on any game or wager, and statutes which make it a criminal offense to bet upon any game, or the like, although not applicable in term to the purchase of options, are sufficiently indicative of the policy of the law as respects mere wagering contracts, of whatever description or name, to require the court to pronounce all such contracts and securities invalid in the hands of those who were implicated in violating public policy by specifically aiding or directly participating in the furtherance of such transactions. They do not, however, go to the extent of destroying commercial securities in the hands of innocent holders for value, even though such securities may have had their inception in a transaction thus condemned.

But a note given for a gambling debt is not valid and collectible in the hands of an assignee who purchased with knowledge that the note was given for such debt, but after a statement made to him by the maker that the note was all right and would be paid, where it does not appear that he relied upon or was deceived by such statement.²

In Iowa, a note given for "Bohemian oats" purchased pursuant to an agreement that the transaction is of a speculative character, and is not based upon the real value of the grain, is not void on the ground that it was given pursuant to a gambling contract, within the meaning of Iowa Code, § 4029, as the agreement does not rest upon any condition.³

Contracts for the future delivery of grain, where a delivery in fact is contemplated, are legitimate, even though the parties may at the same time contemplate the possibility of a settlement by a

¹*Shaw v. Clark*, 49 Mich. 384.

²*Spray v. Burk*, 123 Ind. 565.

³*Hauks v. Brown*, 79 Iowa, 560.

payment of the differences between the contract price and the market price without the delivery of the grain.¹

A guaranty that cattle of another person will sell in market for 4 cents per pound, made in consideration of the payment of \$30, and an agreement by the other party to pay the guarantor any excess in the selling price above 4 cents per pound is a gambling contract.² So is a contract to settle differences.³

In Kansas the Statute covers all devices for gaming or wagering and declares them criminal, and in *Cobb v. Prell*, 15 Fed. Rep. 774, the court said that the case turns upon the question whether or not it was the intention of the parties that the corn should be delivered.

In Kentucky the intended settlement by payment of difference is held void as a wagering contract.⁴ The device known as a "bucket shop," being a mere wager on the future price of grain, is illegal.⁵

In Massachusetts wagers are invalid.⁶ There, under a statute, a party must be the owner of shares he attempts to sell, or he must be the agent of the owner, and he must prove this fact. But this will not prevent a recovery by a broker, who has rendered himself personally liable, and advances money at the purchaser's request, although the seller did not own the stock when sold.⁷

A contract that the defendant should give orders from time to time to the plaintiff for the purchase and sale, on account of the defendant, of equal amounts of pork to be delivered in the future; that the plaintiff should, in his own name, make these purchases and sales on the board of trade, and should, at or before the time of delivery, procure these contracts to be set off against each other according to the usages of that board; that the defendant should not be required to receive any pork and pay for it, or to deliver any pork and receive the pay for it, but should only be

¹*Tomblin v. Callen*, 69 Iowa, 229; *Douglas v. Smith*, 74 Iowa, 468.

²*First Nat. Bank of Oreston v. Carroll*, 8 L. R. A. 275, 80 Iowa, 11.

³*Murray v. Ocheltres*, 59 Iowa, 435; *First Nat. Bank of Lyons v. Oskaloosa Packing Co.* 66 Iowa, 41.

⁴*Lyons v. Hodgen* (Ky.) 12 Ky. L. Rep. 211.

⁵*Smith v. Western U. Teleg. Co.* 84 Ky. 664; *Beadles v. McElrath*, 85 Ky. 230.

⁶*Sampson v. Shaw*, 101 Mass. 150.

⁷*Durant v. Burt*, 98 Mass. 161.

required to pay to the plaintiff, or entitled to receive from him, the differences between the amounts of money which the pork was bought for and was sold for; and that the defendant should furnish a certain margin and should pay the plaintiff his commissions,—is a wagering contract.¹

In Maryland a contract to purchase shares of stock, without the intention to deliver, is a gambling contract; and, the contract being for the purchase of stocks, bonds, and grain in other states, deliveries to be made in Pennsylvania, the law of Pennsylvania would govern an action by the broker for money advanced.

Where a contract between principals is a mere wagering one, the broker cannot recover for services, money advanced, interest on sales, the purchase of stock, etc. The fact that the broker acted only in negotiating the contract, and is not suing to enforce the original contract, but only for services, etc., makes no difference.²

Dealings in margins are gambling contracts and not enforceable.³

In Maine wagers are invalid,⁴ and payment of differences, if intended in making the contract, renders it void.⁵ In Michigan the same result follows.⁶

In Mississippi a contract of sale for the future delivery of cotton is binding, unless it be shown that it was the intention of both parties thereto that there should be no actual delivery, but only a settlement by the payment of the difference between the contract price and the market price when the delivery is to be made.⁷

In Missouri wagers are invalid.⁸ An action on a certificate of deposit payable to order, indorsed by the payee in consideration of a gambling transaction cannot be maintained.⁹

A contract that A should receive the excess over, or pay the

¹*Harvey v. Merrill*, 5 L. R. A. 200, 150 Mass. 1.

²*Stewart v. Schall*, 3 Cent. Rep. 509, 65 Md. 289.

³*Burt v. Myer*, 71 Md. 467.

⁴*Gilmore v. Woodcock*, 69 Me. 118.

⁵*Rumsey v. Berry*, 65 Me. 570.

⁶*Gregory v. Wendell*, 40 Mich. 432, 39 Mich. 387; *Shaw v. Clark*, 49 Mich. 356.

⁷*Clay v. Allen*, 68 Miss. 426.

⁸*Waterman v. Buckland*, 1 Mo. App. 45

⁹*Kansas Nat. Bank v. National Bank of Commerce*, 38 Fed. Rep. 800.

difference, from a certain amount compared with what B should receive on market sale of hogs owned by him, contemplating no delivery or other payment, is a wager.¹

The defense that the contract sued on was a wagering contract must be specially pleaded. It cannot be shown under the general issue.²

A contract contemplating the mere payment of differences will not be sustained.³

In Nebraska it is ruled that in determining upon the validity of contracts to purchase and receive grain, although the outward forms of law may have been complied with, yet where the defense is that the contract is a wagering one, and not intended for the actual sale and delivery of the property, it is the duty of the courts to go behind the contract, and examine the facts and circumstances which attended the making of it, in order to ascertain its true character. And where doubt is cast upon the real character of the transaction, the testimony of the commission merchant that he never received a warehouse receipt for the grain he claimed to have purchased, and that he did not know where it was stored, and that he settled the alleged losses by "ringing up" in the board of trade, does not show such a bona fide purchase as it became his duty to show after doubt was cast upon the matter.⁴

Money wagered on the result of a horse race may be recovered from the stakeholder by the party depositing the same, if, before the stake is paid over to the winner, a demand has been made upon the stakeholder for its return.⁵

In New Hampshire wagers are treated as void.⁶

In New Jersey wagers on indifferent questions are not prohibited;⁷ contracts for future delivery contemplating the payment of differences only are illegal.⁸

In New York, wagers, bets, or stakes upon any race, game, lot

¹*Johnson v. Kaune*, 8 West. Rep. 448, 21 Mo. App. 22.

²*Commiskey v. Williams*, 2 West. Rep. 604, 20 Mo. App. 606.

³*Kent v. Milltenberger*, 18 Mo. App. 503; *Ream v. Hamilton*, 15 Mo. App. 577; *McLean v. Stuve*, 15 Mo. App. 317.

⁴*Sprague v. Warren*, 3 L. R. A. 679, 26 Neb. 326.

⁵*Deaver v. Bennett*, 29 Neb. 812.

⁶*Winchester v. Nutter*, 52 N. H. 507.

⁷*Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. 576.

⁸*Flagg v. Baldwin*, 38 N. J. Eq. 219.

or chance, casualty or unknown or contingent event are unlawful, and all contracts for or on account of any money or property or thing in action so wagered, bet or staked is void.¹

Contracts, where authority is actually given to defendants to make an executory contract for the sale of stock deliverable at a future day, being legal, it is the duty of the courts to protect agents who in good faith make them for their principals, but the authority must be given and the agency actually assumed. It will not do to set up an agency after a loss has happened upon a vague and indefinite transaction.²

A contract between coffee brokers doing business upon the New York Coffee Exchange and an individual, purporting to be for the sale and purchase of coffee, is a wagering contract, and void if the parties intended that there should be no actual delivery, but merely speculations as to the future price of the commodity, with settlements of differences, notwithstanding the existence of rules of the exchange requiring actual delivery.³

In Ohio, all contracts to purchase food products, grain or flesh, the seller not having the property in ownership or the property on hand for delivery, or when the purchaser has not the means to pay, or there is no intention to deliver or receive, are declared void. This condemnation is also extended to stocks and petroleum, and to sales by margins or futures either in person or by broker. An offer to sell, accepted or not, is declared a crime; as is the statement of any offer to sell, or quotation of prices of margins, futures or options; doing which renders one an accessory and punishable as a principal. The Act does not apply to legally incorporated produce exchanges, chambers of commerce or boards of trade, or to members thereof, or their agents, when transactions are done in accordance with the rules, and executed therein; or to persons dealing with or through them, or reporting their transactions; and it is declared that the Act shall not apply to or interfere with legitimate business transactions in the regular course of trade.⁴

¹8 N. Y. Rev. Stat. 1962.

²*Sterling v. Jaudon*, 48 Barb. 459.

³*Muckey v. Rausch* (Sup. Ct.) 15 N. Y. Supp. 4. See *Kingsbury v. Kirwan*, 77 N. Y. 612; *Bigelow v. Benedict*, 70 N. Y. 202; *Yerkes v. Salomon*, 11 Hun, 471; *Cassard v. Hinman*, 1 Bosw. 207.

⁴Act May, 1885.

Under this Statute evidence that a debt was a balance in dealings on the board of trade in margins in wheat, is not sufficient to prove the transaction a gambling one.¹

But any contract of future delivery, contemplating only payment of differences is void.²

In Oregon wagers are not illegal.³

In Pennsylvania the Statute formerly forbade any contract of sale of corporate stock or securities, when it is understood or stipulated that the contract may be executed or performed at any future time, exceeding five judicial days, next ensuing the date of the contract. Laws of 1841, p. 398, § 6. This Act has since been repealed. But all wagers are held illegal, as Penn did not bring this part of the common law with him.⁴

Anything which induces men to risk their money or property, without any other hope of return than to get for nothing any given amount from another, is gambling.

Every species of gaming contract, whether of insurance by a valued policy where the insured has no interest, or the purchase of stocks or other commodities without the intention to deliver or receive them, is unlawful in this State.

A transaction in stocks by way of margin, settlement of difference, and payment of gain or loss, without intending to deliver stocks, is a mere wager, which the law does not sanction and will not carry into effect.⁵

It has been held in Pennsylvania and New Jersey that if the customer intended only to deal in differences, and not to deliver himself the actual commodities, it made no difference that the broker made actual and enforceable contracts.⁶

If no intention existed to make a delivery and acceptance, of course the transaction was illegal.⁷

¹*Preston v. Cincinnati, C. & H. V. R. Co.* 1 L. R. A. 140, 86 Fed. Rep. 54.

²*Kahn v. Walton*, 46 Ohio St. 195; *Edwards v. Hoeffinghoff*, 88 Fed. Rep. 635.

³*Misner v. Knapp*, 18 Or. 185.

⁴*Edgell v. M'Laughlin*, 6 Wheat. 176; *Brua's App.* 55 Pa. 294.

⁵*Waugh v. Beck*, 5 Cent. Rep. 589, 114 Pa. 422.

⁶*Fareira v. Gabell*, 89 Pa. 89; *Flagg v. Baldwin*, 88 N. J. Eq. 219.

⁷*Brua's App.* 55 Pa. 294; *Swarte's App.* 8 Brewst. 131; *Fareira v. Gabell*, 89 Pa. 89; *Ruchisky v. De Haven*, 97 Pa. 202; *Dickson v. Thomas*, 97 Pa. 278; *Thompson's Estate*, 15 Phila. 582.

Money loaned for the specific purpose that it shall be used by the borrower to do an act in violation of the law,—such as stock jobbing,—and which has been so used, cannot be recovered back by the lender.

Where a broker is privy to a wagering contract, and brings the parties together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or loss incurred by him in forwarding the transaction.

A bond given to cover margins in a gambling transaction will not be enforced in favor of the assignee, unless obligor precluded defense by stating that he had none, to the assignee, before his purchase from the obligee.¹

In Rhode Island a contract in future delivery to be settled in differences, is void.²

In Tennessee it is a good defense to a complainant's bill to recover money advanced, that the advances were made in the purchase of cotton futures, with the distinct understanding that no cotton was to be delivered or price paid therefor, and that the intention of the parties was to speculate in the rise and fall of the price of cotton.³

In Texas all wagers are recoverable except such as are prohibited by statute, or are against public policy, or tend to affect the interest, character, or feelings of third parties. A wager on a horse-race is recoverable.⁴

A contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, or any other means of getting them than to go into the market and buy them; but such a contract is valid only when the parties really intend and agree that the goods are to be delivered by the seller and the price is to be paid by the buyer.⁵

If, under the guise of such a contract, the real intent of the parties be merely to speculate in the rise or fall of prices, the

¹ *Waugh v. Beck*, 114 Pa. 422, 5 Cent. Rep. 539.

² *Flagg v. Gilpin*, 17 R. I. —.

³ *Beadles v. Ownby*, 16 Lea, 424; *McGrew v. City Produce Exch.* 85 Tenn. 572; *Dunn v. Bell*, 85 Tenn. 581.

⁴ *Kirkland v. Randon*, 8 Tex. 10; *Bass v. Peavey*, 23 Tex. 295.

⁵ *Seeligson v. Lewis*, 65 Tex. 215; *Floyd v. Paterson*, 72 Tex. 202.

whole transaction constitutes nothing more than a wager, is contrary to public policy, and is void.¹

Under the Statute of Virginia, Code, 1873, p. 984, § 2, as under that of New York, 1 Rev. Stat. N. Y. title 8, art. 3, § 8, p. 662, money advanced solely for the purpose of carrying "cotton futures," for which the party advancing has contracted with another, cannot be recovered, where the payment of "differences" only was intended.² The decision in *Brown v. Speyers*, 20 Gratt. 96, does not conflict with this construction of the Virginia statute.

In Wisconsin whatever form these engagements assume, if neither party actually intend to sell and deliver or buy and pay for the article specified, but only mean to call for and pay the difference between the contract price and the price at a future day, the transaction is not enforceable.³

§ 3. Courts, in Matter of Contract, Will first Protect the Public—Legislative Action.—It may be regarded as well settled that, in the law of contracts, the first purpose of the courts is to look to the welfare of the public, and that if the enforcement of an agreement would be inimical to its interests, no relief can be granted to the party injured, although it might result beneficially to the party who may violate the agreement.

That a person executed a note given on an illegal consideration, with full knowledge of all the facts, is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law.⁴

Contracts to mislead the public in imposing on them a spurious article or unqualified person,⁵ contracts in fraud of the revenue or to pervert elections or to bribe public officers, compounding felonies, and gambling contracts, or agreements in violation of law

¹*Seeligson v. Lewis*, 65 Tex. 215.

²*Embrey v. Jemison*, 181 U. S. 336, 33 L. ed. 172; *Bigelow v. Benedict*, 70 N. Y. 202, 206; *Story v. Salomon*, 71 N. Y. 420, 422; *Kingsbury v. Kirwan*, 77 N. Y. 612.

³*Everingham v. Meigham*, 55 Wis. 354; *Lowry v. Dillman*, 59 Wis. 107.

⁴*Embrey v. Jemison*, 181 U. S. 336, 33 L. ed. 172.

⁵*Pacific Guano Co. v. Moran*, 66 Ala. 582; *Ryan v. School Dist. No. 13 of Dakota County*, 27 Minn. 488; *Wells v. People*, 71 Ill. 582; *Stewartson v. Lathrop*, 12 Gray, 52.

or morality, and by statutes, all wager or gambling contracts, all come within the restriction.¹

Contracts whose tendencies violate moral principles, are disapproved on the grounds of public policy.²

Contracts which are based upon immoral considerations or which require the performance of immoral acts are void. The common law prohibits anything which is unjust or *contra bonos mores*.³

Neither one who knowingly rents a house nor he who knowingly furnishes it to be used for the purposes of prostitution can recover either the rental value or the price of the goods.⁴

When satisfied that a transaction is demoralizing in its character, a court will not hesitate to hold all contracts or promises based thereon void as against public morals.⁵

¹*Bunn v. Riker*, 4 Johns. 436; *Yates v. Foot*, 12 Johns. 1; *Smith v. McMaster*, 2 Brown, 183; *Swayze v. Hull*, 8 N. J. L. 66; *Seidenbender v. Charles*, 4 Serg. & R. 156; *Myers v. State*, 1 Conn. 504; Pars. Cont. (7th ed.) *746, citing *Schifner v. Gordon*, 12 East, 304; *Belding v. Pitkin*, 2 Cal. 149; *Springfield Bank v. Merrick*, 14 Mass. 322; *Russell v. De Grand*, 15 Mass. 35; *Allen v. Rescous*, 2 Lev. 174; *Fletcher v. Orcott*, 1 Selden, 56; *Holman v. Johnson*, Cowp. 146; *Gaslight Co. v. Turner*, 7 Scott, 779; *Witherell v. Jones*, 3 Barn. & Ad. 221; *Picas v. Nicholls*, 2 C. B. 501; *Simpson v. Bloss*, 7 Taunt. 446; *Robinson v. Patterson*, 71 Mich. 141; *Cook v. Phillips*, 56 N. Y. 810. *Lord v. Chadbourne*, 42 Me. 429; *Roby v. West*, 4 N. H. 285; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 248, 6 L. ed. 468; *McGregor v. Donnelly*, 67 Cal. 149; *Wheeler v. Russell*, 17 Mass. 258.

²*Belding v. Pitkin*, 2 Cal. 149; *White v. Franklin Bank*, 22 Pick. 184; *Com. v. Waterman*, 122 Mass. 43; *Wilson v. Ensworth*, 85 Ind. 399; *Bredin's App.* 92 Pa. 241; *State v. Savoye*, 48 Iowa, 562; *State v. Murphy*, 6 Ala. 765; *Walker v. Gregory*, 36 Ala. 180; *Forsythe v. State*, 6 Ohio, 19; *Cole v. People*, 84 Ill. 215; *Sherman v. Barrett*, 1 McMull. L. 147; *Drennan v. Douglas*, 102 Ill. 341; *Anderson v. Com.* 5 Rand. (Va.) 627; *Hanks v. Naglee*, 54 Cal. 51; *Brown v. Langford*, 3 Bibb, 497.

³*Allen v. Rescous*, 2 Lev. 174; *Fletcher v. Harcott*, Hutton, 56; *Holman v. Johnson*, Cowp. 343; *Printing Co. v. Sampson*, L. R. 19 Eq. 465; *Hutchins v. Weldin*, 13 West. Rep. 349, 114 Ind. 80; *Merrick v. Bank of Metropolis*, 8 Gill, 59; *Dumont v. Dufore*, 27 Ind. 263; *Root v. Stevenson*, 24 Ind. 115; *Forsythe v. State*, 6 Ohio, 19; *Fores v. Johns*, 4 Esp. 97; *Com. v. Waterman*, 122 Mass. 43; *White v. Franklin Bank*, 22 Pick. 184; *Wilson v. Ensworth*, 85 Ind. 399; *State v. Savoye*, 48 Iowa, 562; *Belding v. Pitkin*, 2 Cal. 149.

⁴*Riley v. Jordan*, 122 Mass. 231; *Smith v. State*, 6 Gill, 425; *Mackbee v. Griffith*, 2 Cranch, C. C. 336; *Hanauer v. Doane*, 79 U. S. 12 Wall. 342, 20 L. ed. 439; *Dyett v. Pendleton*, 8 Cow. 727; *State v. Potter*, 28 Iowa, 557; *Bouery v. Bennet*, 1 Campb. 848; *Pierce v. Brooks*, L. R. 1 Exch. 213; *Jennings v. Throgmorton*, Ryan & M. 251; *Smith v. White*, L. R. 1 Eq. 626; *Hamilton v. Granger*, 5 Hurlst. & N. 40; *Com. v. Harrington*, 3 Pick. 26; *State v. Potter*, 30 Iowa, 587.

⁵*Lyon v. Waldo*, 36 Mich. 353; *Shaw v. Clark*, 49 Mich. 387; *Mutual Ben. Assn. of Michigan v. Hoyt*, 46 Mich. 473; *Timmerman v. Bidwell*, 62 Mich. 205.

It is void as to every person whose rights would be in any manner involved if it were legal.¹

A contract to sell letters written by persons afflicted with diseases to one advertising to cure such diseases is *contra bonos mores*, and void upon grounds of public policy.²

The right to recover back money paid to a real estate broker who has concealed the fact that he was acting for both parties rests upon grounds of public policy, and not upon the advantageous or disadvantageous character of the sale.³

A contract that one selected to give his best judgment between two adverse parties shall be paid in proportion to the sum awarded by him against one of the parties, is void as against public policy.⁴

The rules that declare certain contracts are void as against public policy, are not to be arbitrarily extended; for if there is one thing more than another that public policy requires it is that persons of full age and competent understanding shall have the utmost liberty, at all consistent with the public good, of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. This freedom of contract is not lightly to be interfered with.⁵ Nor will the illegal contract defeat an action for an injury, disconnected with the transaction itself. Thus the rule that courts will not enforce immoral or illegal claims cannot affect the liability of a railroad company for constructing and operating an elevated railway in the street, in front of a house used as a place of prostitution, when such elevated railway depreciates the rental value of the house for ordinary purposes. The occupation of the house for purposes of prostitution does not justify the injury to its value generally. The particular use of the house has nothing to do with the injury suffered by its owner from the elevated roadway, but the injury is wholly independent of such use. The claim for damages does not rest upon the occupation for the special purpose, nor does its enforcement sanction nor encourage such use.⁶

¹*Kellogg v. Howes*, 81 Cal. 170.

²*Rice v. Williams*, 83 Fed. Rep. 487.

³*Cannell v. Smith* (Pa.) 12 L. R. A. 395.

⁴*Thomas v. Caulkett*, 57 Mich. 392.

⁵*Egerton v. Brownlow*, 4 H. L. Cas. 1 — 260; *Sir G. Jessel, M. R. in Printing & Numerical Registering Co. v. Sampson*, 19 Eq. 462, 465.

⁶*Laurance v. Metropolitan Elevated R. Co.* 13 L. R. A. 102, 126 N. Y. 488; *Ely v. Niagara County Supers.* 86 N. Y. 297.

CHAPTER II.

CONTRACTS AS AFFECTED BY STATUTE.

- § 4. *Contracts to Contravene a Statute Void.*
- 5. *Contract Void though Object not Expressly Prohibited by Statute. when.*
- 6. *Statutes simply Directory do not Invalidate Contracts.*
- 7. *Statutes Protecting the Public from Imposition and Empiricism; Exercise of Police Power.*
 - a. *Statutes Requiring Inspection, etc., of Goods.*
 - b. *License to Practice Medicine.*
 - c. *Solicitation to Purchase Liquors—Illegal Sale.*
 - d. *Violating Foreign Laws.*
 - e. *Sunday Laws.*
- 8. *Subject Matter and Purpose of Legislation Determine Effect on Contracts.*
 - a. *Intent of Legislators must Control; Homestead Laws.*
 - b. *Penalty for Performing Marriage Ceremony.*
 - c. *Usury Laws.*
 - d. *Internal Revenue Laws.*
 - e. *Excessive Loans by Banks.*
 - f. *Offering Unbranded Goods.*
 - g. *Unlicensed Peddler, Commercial Fertilizers.*

§ 4. *Contracts to Contravene a Statute Void.*—The rule that a contract made for the purpose of furthering any matter or thing prohibited by the statute, or to aid or assist any party therein, is void, applies to every contract founded on a transaction *malum in se*, or which is prohibited by statute on the ground of public policy.¹

A contract founded on an act which is prohibited by statute, under a penalty, is void.²

Wherever the consideration which is the ground of the prom-

¹*Gardner v. Tatum*, 81 Cal. 370.

²*Milton v. Hayden*, 32 Ala. 30.

ise, or the promise which is the consequence or effect of the consideration, be unlawful, the whole contract is void.*

A contract for the accomplishment of something forbidden by a statute, in the sense of making it unlawful for anyone to enter into such a contract, is void.* Contracts which have in contemplation any act contrary to the statute, are void.* A contract which contemplates the performance of acts against public policy, or which are forbidden by statute, is absolutely void.* A promise made in consideration of an act which is forbidden by the United States Constitution is void,* and no contract can be enforced if it is in violation of the laws of the United States, or is in contravention of the public policy of the government, or in conflict with subsisting treaties.*

When a contract is forbidden by the common or statute law, no court, either of law or equity, will lend its assistance to give it effect.*

That which the law prohibits, either in terms or by affixing a penalty to it, is unlawful; and it will not promote in one form that which it declares wrong in another.*

Contracts to do an illegal act or to omit a legal public duty are void.*

¹ *Wolbertson v. Davis*, 1 Bulst. 38; *Bank of United States v. Owens*, 27 U. S. 2 Pet. 527, 7 L. ed. 508.

² *Griffith v. Wells*, 3 Denio, 226; *Burkholder v. Beeten*, 65 Pa. 496; *Sumner v. Summers*, 54 Mo. 340; *Adams v. Bartlett*, 5 Ga. 404; *Ashburner v. Purriah*, 81 Pa. 52; *Coppell v. Hall*, 74 U. S. 7 Wall. 558, 19 L. ed. 248; *Brown v. Tarkington*, 70 U. S. 8 Wall. 381, 18 L. ed. 257; *Hodsdon v. Wilkins*, 7 Me. 113; *Stebbins v. Leowolf*, 3 Cush. 137.

³ *Caldwell v. Bridal*, 48 Iowa, 15; *Tenney v. Root*, 4 Ill. App. 594; *Prescott v. Battersby*, 119 Mass. 285; *Woods v. Armstrong*, 54 Ala. 150; *Grell v. Levy*, 16 C. B. N. S. 79; *Re Cork & Y. R. Co. L. R.* 4 Ch. App. 748.

⁴ *Greenhood*, Pub. Pol. Rule 2, etc.; *Metcalf*, Cont. (Heard's ed. 1888.) pp. 301, 302; *Oscanyan v. Winchester Rep. Arms Co.* 103 U. S. 267, 26 L. ed. 542; *Wight v. Rindskopf*, 48 Wis. 344; *De Wit v. Lander*, 72 Wis. 120; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Burlington, C. R. & N. R. Co. v. Northwestern Fuel Co.* 31 Fed. Rep. 652; *Dunham v. Presby*, 120 Mass. 235; *Valentine v. Stewart*, 15 Cal. 887, 388; *Bixby v. Moor*, 51 N. H. 402; *Solomon v. Dreschler*, 4 Minn. 278; *Ingersoll v. Randall*, 14 Minn. 400.

⁵ *Craig v. Mo.* 29 U. S. 4 Pet. 410, 7 L. ed. 903.

⁶ *Kennett v. Chambers*, 55 U. S. 14 How. 38, 14 L. ed. 316.

⁷ *Indianapolis, D. & S. R. Co. v. Ervin*, 6 West. Rep. 104, 118 Ill. 250.

⁸ *Waugh v. Beck*, 5 Cent. Rep. 540, 114 Pa. 422.

⁹ *Pearson v. Chapin*, 44 Pa. 9.

If one promises to do a thing that is unlawful, such promise is void.¹

Every act is now regarded as unlawful which the law forbids to be done; and every contract is declared void which contravenes any legal principle or enactment.²

Any act forbidden by the common law cannot be the foundation of a valid contract.³

§ 5. Contract Void though Object not Expressly Prohibited by Statute, when.—This rule declaring such contracts illegal applies if necessary to accomplish the purpose of the statute whether the statute contains an express prohibition of an attempt to contravene it or not.⁴

Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there were no prohibitory words in the statute.⁵

It cannot be the foundation of a right as between the immediate parties.⁶ And cannot be enforced in any court sitting in the State.⁷

¹ *Bank of U. S. v. Owens*, 27 U. S. 2 Pet. 527, 7 L. ed. 508.

² *Aubert v. Maze*, 2 Bos. & P. 374; *Cannan v. Bryce*, 3 Barn. & Ald. 183; *Greenough v. Balch*, 7 Me. 463; *White v. Buss*, 3 Cush. 450; *Cranson v. Goss*, 107 Mass. 440, 441; *Tyler v. Larimore*, 19 Mo. App. 445; *Suits v. Taylor*, 20 Mo. App. 166, 2 West. Rep. 579.

³ *Reynolds v. Nichols*, 12 Iowa, 898; *Wheeler v. Russell*, 17 Mass. 282.

⁴ *Seidenbender v. Charles*, 4 Serg. & R. 156; *Larned v. Andrews*, 106 Mass. 435; *Myers v. States*, 1 Conn. 503; *Stanley v. Nelson*, 28 Ala. 514; *Biddis v. James*, 6 Binn. 321; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Barton v. Hughes*, 2 Brown (Pa.) 48; *Woods v. Armstrong*, 54 Ala. 150; *Wilson v. Spencer*, 1 Rand. 76; *Prescott v. Batterby*, 119 Mass. 285; *Tuzbury v. Miller*, 19 Johns. 311; *People v. Corporation of Albany*, 11 Wend. 589; *Sharp v. Teese*, 9 N. J. C. 438; *Elkins v. Parkhurst*, 17 Vt. 105; *Bank of United States v. Owens*, 27 U. S. 2 Pet. 527, 7 L. ed. 508; *Pierce v. Evans*, 61 Pa. 415; *Waite v. Harper*, 2 Johns. 886; *Booth v. Bank of England*, 7 Clark & F. 509; *Ex parte Mackay*, L. R. 8 Ch. 643; *Fuller v. Dame*, 18 Pick. 472; *Wiggins v. Bush*, 12 Johns. 806.

⁵ *Jones v. Surpris*, 64 N. H. 243, 4 New Eng. Rep. 292; *Bartlett v. Vinor*, Carth. 252, Skin. 322; *Bliss v. Brainard*, 41 N. H. 256, 263; *Smith v. Godfrey*, 28 N. H. 884; *Caldwell v. Wentworth*, 14 N. H. 431; *Lewis v. Welch*, 14 N. H. 294; *Pray v. Burbank*, 10 N. H. 377; *Martin v. Hodge*, 47 Ark. 378; *Waugh v. Beck*, 5 Cent. Rep. 540, 114 Pa. 422.

⁶ *New v. Walker*, 6 West. Rep. 872, 108 Ind. 865.

⁷ *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1187.

Contracts to secure the vote of a creditor for the discharge of a bankrupt are void, as are all contracts tending to evade the bankrupt law.¹ An agreement by which the creditor of an insolvent is to receive money, by which his vote for the assignee is affected, is illegal.² Whether the contract is with the debtor or a stranger, it is equally void,³ and whether paid from debtor's assets or elsewhere.⁴

But a promise to prefer a creditor in case of insolvency is not invalid where the statutes permit preferences by insolvents.⁵ And the validity of a mortgage executed by a wife personally, and not through the agency of her husband, will not be affected by his intention to give unlawful preference to the mortgagee and have the wife go into insolvency in fraud of the insolvent laws, if the mortgagee had no knowledge of the wife's insolvency or of the husband's intention.⁶

Where a debtor and his general creditors enter into a contract of settlement, to which all are understood to be parties, a secret agreement made by the debtor, or on his behalf, favoring a particular creditor, to secure his assent, is void.⁷

§ 6. Statutes Simply Directory do not Invalidate Contracts.
—The rule is universally accepted, that if a statute prohibits a contract in the sense of making it unlawful for anyone to enter into it, such a contract, if made, is wholly void and cannot be enforced.

¹ *Thimning v. Miller*, 18 Ill. App. 595; *Blasdel v. Fowle*, 120 Mass. 447; *Wilson v. Jordan*, 8 Woods, 642; *Wilson v. Prewett*, 8 Woods, 631; *Claflin v. Turlina*, 56 Mo. 389; *Austin v. Markham*, 44 Ga. 161; *M'Kewan v. Sanderson*, L. R. 20 Eq. 65; *Ex parte McKay*, L. R. 8 Ch. 643; *Elliott v. Richardson*, L. R. 5 C. P. 744.

² *Eaton v. Littlefield*, 6 New Eng. Rep. 341, 147 Mass. 122; *Marble v. Grant*, 73 Me. 423; *Blasdel v. Fowle*, 120 Mass. 447; *Payne v. Eden*, 3 Cal. 213; *Rice v. Maxwell*, 18 Smedes & M. 289; *Austin v. Markham*, 44 Ga. 161; *Sharp v. Teese*, 9 N. J. L. 433.

³ *Bank of Commerce v. Hoerber*, 11 Mo. App. 475; *Bell v. Leggett*, 7 N. Y. 176; *Higgins v. Pitt*, 4 Exch. 312.

⁴ *Hall v. Dyson*, 17 Q. B. 785.

⁵ *Fechheimer v. Baum*, 48 Fed. Rep. 719.

⁶ *Bridges v. Miles*, 152 Mass. 249.

⁷ *Feldman v. Gamble*, 26 N. J. Eq. 494; *Lawrence v. Clark*, 86 N. Y. 128; *Clarke v. White*, 37 U. S. 12 Pet. 178, 199, 9 L. ed. 1048; *Huckins v. Hunt*, 138 Mass. 366; *Smith v. Owens*, 21 Cal. 11; *Bliss v. Matteson*, 45 N. Y. 22; *Stuart v. Blum*, 28 Pa. 225; *Lee v. Sellers*, 81 *Pa. 473; *Sternburg v. Bowman*, 103 Mass. 325.

But it is not always clear whether a statute forbidding the doing of a thing,¹ or imposing a penalty,² or enjoining the mode of doing it, is prohibitory so as to make any contract in violation of it absolutely void, or whether it is directory in its purpose, and does not necessarily invalidate the contract. The best considered and clearest expressed decisions recognize a clear distinction between these two class of cases, although in deciding special cases it is often not alluded to and general propositions are stated not apparently regarding the distinction. It will be found however that, with perhaps a few exceptions, the cases will fall in line under the foregoing and following rules.

§ 7. Statutes Protecting the Public from Imposition and Empiricism; Exercise of Police Power.

a. Statutes Requiring Inspection, etc., of Goods.—Statutes in the United States and in England have been enacted in substance that goods should only be sold in certain measures or in a certain manner, or after being inspected or branded by public officers, and it has been held that contracts of sale which do not meet the requirements of such statutes are absolutely void, and that a contract in violation of a statute imposing a penalty for the sale of goods by unsealed scales or measure is void.³ The purpose of such statutes is to protect the buyer from the imposition of the seller, a purpose which could not be accomplished unless the contracts are held void, and therefore the courts are bound to assume this to have been the legislative intent.⁴

b. License to Practice Medicine.—A contract made to render medical services with one who has not obtained a certificate showing that he possesses the necessary qualifications, is contrary to public policy and void.⁵

A contract to pay a fee for services rendered by a physician who is not licensed is void in its inception, where a statute pro-

¹ *Wheeler v. Hawkins*, 116 Ind. 515.

² *De Mers v. Daniels*, 39 Minn. 158.

³ *Bisbee v. McAllen*, 39 Minn. 143.

⁴ *Bisbee v. McAllen*, 39 Minn. 143; *Faircloth v. DeLeon*, 81 Ga. 158; *Miller v. Post*, 434, and cases cited; *Libbey v. Downey*, 5 Allen, 299; *Sawyer v. Smith*, 109 Mass. 220, and cases cited. Benj., Sales, p.

⁵ *Gardner v. Tatum*, 81 Cal. 370.

hibits him from practicing for fee or reward.¹ Under an Act to protect the people from empiricism, and to elevate the standing of the medical profession, declaring it unlawful for a person to furnish medicines as a practicing physician, unless authorized to practice in accordance with the provisions of the statute, one so furnishing medicine cannot recover in a civil action for medicine so prescribed as a physician.²

It is within the police power of the State to prescribe rules and tests for the ascertainment of the qualifications of applicants for authority to practice medicine as a livelihood.³ Such a statute may include one who as a physician merely gives electric treatments.⁴

Such statutes, however, do not confer upon the examining board the right or power to absolutely disregard the learning and qualifications of an applicant, or to unreasonably or arbitrarily reject his claims, or, at will, grant or refuse its certificate or license.⁵

But if a physician acts under a mistake of fact as to the record of his license, he is not liable under the statute to its penalties;⁶ and a physician who, in consequence of the fact that the proper officer did not have a book in which he could register, did not succeed in doing so, as required by law, but who was called to attend a patient and did so, practicing without such register, can recover his fee, where it appears that he did register as soon as the book was obtained by the officer, and within the date a writ of mandate could have been effective upon the officer.⁷

c. Solicitation to Purchase Liquors—Illegal Sale.—Under a statute making it an offense for a person to solicit or take orders

¹*Puckett v. Alexander*, 8 L. R. A. 48, 102 N. C. 95.

²*Underwood v. Scott*, 48 Kan. 714; *Harrison v. Jones*, 80 Ala. 412; *State v. State Board of Medical Exmrs.* 34 Minn. 387; *Puckett v. Alexander*, 8 L. R. A. 48, 102 N. C. 95.

³*Brooks v. State*, 88 Ala. 122; *People v. Fields*, 52 Hun, 65; *Martino v. Kirk*, 55 Hun, 474; *Ex parte McNulty*, 77 Cal. 164; *State v. Ragland*, 81 W. Va. 453; *Orr v. Meek*, 9 West. Rep. 241, 111 Ind. 40; *Williams v. People*, 9 West. Rep. 461, 121 Ill. 84; *People v. Phippin*, 14 West. Rep. 247, 70 Mich. 6; *Richardson v. State*, 47 Ark. 562.

⁴*Davidson v. Bohlman*, 37 Mo. App. 576.

⁵*Pettit v. State*, 28 Tex. App. 240.

⁶*State v. Fleischer*, 41 Minn. 69.

⁷*Parish v. Foss*, 75 Ga. 489.

for spirituous liquors in the State, to be delivered at a place without the State, having cause to believe the intent is to bring them within the State for sale, a contract made in violation of the statute is void;¹ and the seller is chargeable with the knowledge of his agents.²

Where the hiring of a clerk and bookkeeper, by a grocery keeper, who also sold liquor illegally, was for one entire consideration, the employé cannot recover anything on his contract of employment, even upon *quantum meruit* for services in the grocery part of the business.³

But where a corporation sold and delivered beer to the keeper of a house of prostitution, and the agent knew his business, but did not know just what was to be done with it, but supposed it was to be used or sold in the brothel, a recovery was allowed.⁴

But the owner of a building willfully permitting the illegal sale within it of liquor, cannot recover rent for its use.⁵

The court will not recognize a contract between attorneys and other persons engaged in the illegal sale of liquor to defend all cases brought against the latter for violations of prohibitory liquor laws, in consideration of a certain monthly compensation; as such a contract is against public policy.⁶

Wherever an indictment can be sustained for the illegal sale of liquors, there the price cannot be recovered.⁷

But the vendor's mere knowledge that the vendee intends to make an unlawful use of the goods sold is not sufficient to invalidate the sale.⁸

A sale of cigars is not rendered illegal by knowledge of the seller that the purchaser will dispose of them for the advancement of his illegal business in trafficking in intoxicating liquors.⁹

¹ *Lang v. Lynch*, 38 Fed. Rep. 489.

² *Fisher v. Bennett*, 5 New Eng. Rep. 615, 56 Conn. 40.

³ *Sullivan v. Hergan*, 9 L. R. A. 110, 17 R. I. —.

⁴ *Anheuser-Busch Brew. Assn. v. Mason*, 9 L. R. A. 506, 44 Minn. 818.

⁵ *Mitchell v. Scott*, 62 N. H. 596.

⁶ *Bowman v. Phillips*, 41 Kan. 364.

⁷ *Bliss v. Brainard*, 41 N. H. 256, 268; *Smith v. Godfrey*, 28 N. H. 884; *Caldwell v. Wentworth*, 14 N. H. 431; *Lewis v. Welch*, 14 N. H. 294; *Pray v. Burbank*, 10 N. H. 877; *Jones v. Surprise*, 4 New Eng. Rep. 292, 64 N. H. 243; *Fisher v. Lord*, 2 New Eng. Rep. 285, 63 N. H. 514.

⁸ *Kerwin v. Doran*, 29 Mo. App. 397.

⁹ *Delavina v. Hill*, 65 N. H. 94.

d. **Violating Foreign Laws.**—No recovery can be had for intoxicating liquors shipped into a State to a pharmacist, with the knowledge that he is forbidden by the state law to sell them as a beverage, where the seller, in order to aid him in evading the statute, forwards some of the liquors in concealed packages to a fictitious assignee, and furnishes false invoices to aid him in the commission of perjury, as well as in other violations of the law, although the sale of liquors in itself would be legal.¹

But the law, that an executory contract which contemplates the violation of the law of the place or State where the act or thing contemplated by the contract is to be done or performed is void, does not apply where the party against whom it is sought to have the contract adjudged void did not know of any law or policy of such State, the violation of which was contemplated by the other party, or of the violation by the latter of any such law or policy.²

In *State v. O'Neil*, 1 New Eng. Rep. 775, 58 Vt. 140, and three other cases heard together, the first and most important question presented is, whether or not the intoxicating liquors in question were, in the first two cases, in contemplation of law sold, or furnished, by the respondent in the county of Rutland and State of Vermont; or, in the last two cases, held and kept for the purpose of sale, furnishing or distribution contrary to the statute, within said county and State. The answer depends upon whether the National Express Co. by which some of said liquors were delivered to the consignees thereof, and in whose possession the remainder were found and seized before the delivery, was in law the agent of the vendors or of the vendees. If the purchase and sale of the liquors was fully completed in the State of New York, so that upon delivery of them to the express company for transportation the title vested in the consignees, as in the case of a completed and unconditional sale, then no offense against the laws of Vermont has been committed. If, on the other hand, the sale by its terms could only become complete so as to pass the title in the liquors to the consignees upon the doing of some act, or the fulfilling of some condition precedent after they had reached Rutland, then the law is violated.

¹ *Kohn v. Metcher*, 43 Fed. Rep. 641.

² *Wagner v. Breed*, 29 Neb. 720.

The liquors were ordered by residents of Vermont from dealers doing business in the State of New York, who selected from their stock such quantities and kinds of goods as they thought proper, in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the express company as a common carrier of goods for transportation, accompanied with a bill or invoice for collection. The shipment was, in each instance, C. O. D., and the cases show that the effect of the transaction was a direction by the shippers to the express company not to deliver the goods to the consignees except upon payment of the amount specified in the C. O. D. bills, together with the charges for the transportation of the packages and for the return of the money paid. This direction was understood by the express company, which received the shipments coupled therewith.

Whether or not, and when the legal title in property sold passes from the vendor to the vendee, is always a question of the intention of the parties, which is to be gathered from their acts and all the facts and circumstances of the case taken together.

In order that the title may pass, as was said by Morton, *J.*, in *Mason v. Thompson*, 18 Pick. 305: "The owner must intend to part with his property, and the purchaser to become the immediate owner. Their two minds must meet on this point, and if anything remains to be done before either assents, it may be an inchoate contract, but it is not a perfect sale." The authorities seem to be uniform on this point; and the acts of the parties are regarded as evidence by which the court or jury may ascertain and determine their intent.¹ When there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until performance or waiver of the condition, even though there be an actual delivery of possession.² The Vermont cases to the above points are referred to in Roberts' Digest, 610, *et seq.*, and need not be specially reviewed here.

In the cases under consideration the vendors of the liquors shipped them in accordance with the terms of the orders received, and the mode of shipment was as above stated. They delivered

¹ Benj. Sales, §§ 811, 819, *note c.*

² Benj. Sales, § 820, *note d.*

the packages of liquors, properly addressed to the several persons ordering the same, to the express company, to be transported by that company and delivered by it to the consignees upon fulfillment by them of a specified condition precedent, namely: payment of the purchase price and transportation charges and not otherwise. Attached to the very body of the contract and to the act of delivery to the carrier was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was intended by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee and, if he accepted them and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise to notify the consignor and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention not to relinquish his right of property or possession in goods, until payment of purchase price, than by this method of shipment. The case is undistinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forward them to, or make them deliverable upon the order of his agent, with instructions not to deliver them except on payment of the price, or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods with instructions not to part with the possession of them, except upon prior or contemporaneous receipt of the price. The contract of sale therefore remained inchoate or executory, while the goods were in transit or in the hands of the express company, and could only become executed and complete by their delivery to the consignees. There was a completed executory contract of sale in New York; but the completed sale was or was to be in Vermont.

The authorities upon the above points and principles are numerous.* See text and notes of Benjamin on Sales, 4th Am. ed. bk. 2.

*Even the delivery of the goods on a sale, with the expectation of receiving immediate payment, is not an absolute delivery, and no title vests in the pur-

These are fully supported by the decision of the United States District Court in Illinois in *People v. Shriver*, 31 Alb. L. J. 163, a case involving precisely the same question. Treat, *J.*, says in the opinion: "In the case of liquor shipped by the defendant to Fairfield by express, C. O. D.; the liquor is received by the express company at Shawneetown as the agent of the seller, and not as the agent of the buyer; and on its reaching Fairfield it is there held by the company, as the agent of the seller, until the consignee comes and pays the money; and then the company, as the agent of the seller, delivers the liquor to the purchaser. In such case the possession of the express company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price. An order from a person in Fairfield to the defendant at Shawneetown for two gallons of liquor to be shipped to Fairfield, C. O. D., is a mere offer by the person sending such order to purchase two gallons of liquor from the defendant and pay him for it when he delivers it to him at Fairfield; and a shipment by the defendant according to such order is practically the same as if defendant had himself taken two gallons

chaser until the price is paid or payment waived. *Adams v. O'Connor*, 100 Mass. 515; *Tyler v. Freeman*, 3 Cush. 261; *Whitney v. Eaton*, 15 Gray, 225; *Farlow v. Ellis*, 15 Gray, 229. See *Herrick v. Gallagher*, 60 Barb. 578; *Wagner v. Hallack*, 3 Colo. 184; Benj. Sales, § 320; *Beauchamp v. Archer*, 58 Cal. 431; *Evansville & T. H. R. Co. v. Ervin*, 84 Ind. 457; *Clark v. Hayward*, 51 Vt. 14.

A conditional assignment and delivery of goods to carrier does not vest the title in the consignee until performance of the condition, although the goods were shipped in pursuance of a prior agreement upon a good consideration. *Kelly v. Denning*, 2 McCrary, 453; *Osborn v. Gault*, 60 N. Y. 540; 80 Ill. 511; *Cayuga County Nat. Bank v. Daniels*, 47 N. Y. 681; *Bank of Rochester v. Jones*, 4 N. Y. 497; *Kinsey v. Leggett*, 71 N. Y. 387; *Smith v. Lynes*, 5 N. Y. 41; *Russell v. Minor*, 22 Wend. 659; *Keeler v. Field*, 1 Paige, 312, 2 L. ed. 666; *Haggerty v. Palmer*, 6 Johns. Ch. 437, 2 L. ed. 176; *Chicago Marine Bank v. Wright*, 48 N. Y. 1; *Allen v. Williams*, 12 Pick. 297; *Pierson v. Hoag*, 47 Barb. 243; *New York Guaranty & Indem. Co. v. Flynn*, 55 N. Y. 653; *Lees v. Richardson*, 2 Hilton (N. Y.) 164; *Scudder v. Bradbury*, 106 Mass. 423; *Whitwell v. Vincent*, 4 Pick. 451; *Dresser Mfg. Co. v. Watterston*, 3 Met. 9; *Hill v. Freeman*, 3 Cush. 257; *Hammett v. Linneman*, 48 N. Y. 399; *Barrett v. Goddard*, 3 Mason, 111; *Stollenwerk v. Thacher*, 115 Mass. 224; *Armour v. Pecker*, 123 Mass. 143; *Solomon v. Hathaway*, 126 Mass. 482; *Kenney v. Ingalls*, 126 Mass. 488; *Hirschhorn v. Canney*, 98 Mass. 149; *State v. Comings*, 28 Vt. 508; Benj. Sales, § 320, note d; *Winter v. Coit*, 7 N. Y. 288; *Goodall v. Skelton*, 2 H. Bl. 316; *Boulter v. Arnett*, 1 Crompt. & M. 383; Benj. Sales, § 693; *Clark v. Lynch*, 4 Daly, 83.

of liquor from his store in Shawneetown, and carried it in person to Fairfield and there delivered it to the purchaser and received the price of it. It would be different if the order from Fairfield to the defendant was a simple order to ship two gallons of liquor by express to the person ordering, whether such order was accompanied by the money or not. The moment the liquor under such an order was delivered to the express company at Shawneetown it would become the property of the person ordering, and the possession of the express company at Shawneetown would be the possession of the purchaser; the sale would be a sale at Shawneetown, and if it were lost or destroyed in transit the loss would fall upon the purchaser. But in the case at bar, by the shipping of the liquor to Fairfield, C. O. D., the defendant made no sale at Shawneetown; the right of property remained in himself, and the right of possession, as well as the actual possession, remained in him through his agent. Had it been lost or destroyed in transit the loss would have fallen upon himself. He simply acted upon the request of the purchaser, and sent the liquor to Fairfield by his own agent, and there effected a sale by receiving the money and delivering the liquor."

It is insisted on the part of the claimant in the case of *State v. Sixty-Eight Jugs, etc.*, that § 2 of No. 43 of the Act of 1882, under which the liquors in that case were seized, is unconstitutional. Conceding the points that there is a well recognized right of property in intoxicating liquors, that they are not *malum in se*, and that their use is not by law prohibited to citizens of Vermont, these propositions are nevertheless clearly subject to the qualification that when kept and intended for unlawful use, such liquors fall at once under the ban of the law and become subject to seizure and confiscation by such methods as are provided by law in conformity with the Constitution. That intoxicating liquors when once branded with this unlawful intent on the part of the owner or possessor become subject to confiscation by the Government, and that the methods and means of their seizure and condemnation are within the police powers delegated to the Legislature by article 5, pt. 1 of the Constitution, is too well settled to require extended discussion.¹

¹*Spalding v. Preston*, 31 Vt. 9; *State v. Conlin*, 37 Vt. 818, 825, 827; *State v. Comstock*, 37 Vt. 453; *Gill v. Parker*, 81 Vt. 610; Potter, Dwar. Stat. chap. 14; Cooley, Const. Lim. (4th ed.) 714, 727.

This section gives the officer power to seize without warrant liquor found under circumstances warranting the belief that it is intended for sale or distribution contrary to the provisions of chap. 169, R. L. It does not purport to confer the power of search; nor does anything appear to show that the officer assumed to exercise such power in this case. It simply provides for the seizure without warrant previously issued, of something which the law has declared subject to seizure and condemnation, under the police power delegated by the Constitution, as an instrument intended by the owner or possessor for a use unlawful by express statute, and dangerous to the peace, health and good morals of the community. That the article in itself may be innocuous, may be the subject of lawful ownership, or may even be susceptible of beneficial use, can no more affect the question than could the fact that certain tools were susceptible of lawful and beneficial use in mechanics save them from becoming subject to seizure and confiscation if intended by their owner or possessor for use as the instruments for accomplishing a contemplated burglary; or the harmless character of the metal and its owner's right of property therein to protect his ownership when fashioned and intended for passing as counterfeit coin.

It cannot be doubted in Vermont, since the case of *Spaulding v. Preston*, 21 Vt. 9, and has not been elsewhere, that articles or instrumentalities once impressed with the characteristics of adaptation and intended use for purposes prohibited by law and contrary to the public peace, health or morals, are subject to summary seizure under statutory or even general police regulations. That the liquors in question were intended for such use has been determined in this case as a question of fact by the tribunal designated by law, and that adjudication is conclusive.

The scope and application of article 5, pt. 1 of the Constitution have been defined in the cases above referred to, and in *Re Powers*, 25 Vt. 265, which has ever since been regarded as conclusive against such application of that section of the Bill of Rights as is here contended for by the claimant.¹

In Massachusetts a statute practically identical with the one in

¹ *Gill v. Parker*, 81 Vt. 610; *State v. Peterson*, 41 Vt. 504; *State v. Intox. Liq.* 55 Vt. 82.

question has been held not to contravene a similar constitutional provision.¹

The decisions in Maine are to the same effect.*

Concerning the claim that the Federal Constitution has application, all difficulty under the 8th section, conferring on Congress the exclusive right to regulate commerce between the states, (see *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128) is relieved by the Act of August 8th, 1890, declaring that intoxicating liquors transported into a State or Territory, shall be subject to the laws of the State or Territory enacted in the exercise of its police power, as such legislation has been declared constitutional and valid.²

e. **Sunday Laws.**—A contract by which a person is to have full charge and control of the real estate advertising business in the daily, Sunday and weekly editions of a newspaper, the owner to receive certain rates, the other to have all above those rates, the contract to continue for five years, is void, where the publishing, issuing and circulating of a Sunday newspaper is illegal, as the contract requires the maintenance of the Sunday newspaper for the five years.⁴

And statutes prohibiting any work on the Lord's day except works of necessity or charity have been construed to make entirely void contracts in violation of their provisions.*

§ 8. Subject Matter and Purpose of Legislation Determine Effect on Contracts.

a. Intent of Legislators must Control; Homestead Laws.

—The statute itself must be examined as a whole, to find out whether or not the makers meant that a contract in contravention of it was to be absolutely void, so as not to be enforced in a court of justice.*

¹*Jones v. Root*, 9 Gray, 435; *Mason v. Lathrop*, 7 Gray, 354.

²*State v. McCann*, 59 Me. 888; *State v. Howley*, 65 Me. 100.

³*Wilkinson v. Rahrer*, 140 U. S. 545, 35 L. ed. 572.

⁴*Handy v. St. Paul Globe Pub. Co.* 4 L. R. A. 466, 41 Minn. 188.

⁵*Grant v. McGrath*, 56 Conn. 383; *Lansing Turnverein Soc. v. Carter*, 71 Mich. 607; *Watts v. Van Ness*, 1 Hill, 76; *Palmer v. New York*, 2 Sandf. 818, *Fennell v. Ridler*, 5 Barn. & C. 406; *Allen v. Gardiner*, 7 R. I. 23; *Hazard v. Day*, 14 Allen, 487; *Tucker v. West*, 29 Ark. 386; *Cransen v. Goss*, 107 Mass. 489; *Bernard v. Lapping*, 82 Mo. 841; *Slade v. Arnold*, 14 B. Mon. 287. For a full examination of the subject see Ray, Negligence of Carriers, chap. 19, § 95.

⁶*Harris v. Runnels*, 58 U. S. 12 How. 79, 18 L. ed. 901.

The rule that courts will respect the purpose of legislation, in the enforcement or refusal to give relief in matters of contract, where legislative action has been had on the subject matter of the contract, is illustrated in the decisions of the courts under the homestead laws of the United States. The homestead is a gift from the government to the homesteader, conditioned upon his occupation for five years and upon his making no disposition or alienation during such term; the affidavit of non-alienation is as clear an expression of the legislative intent as a direct prohibition; the whole policy of government in this respect would be thwarted if the homesteader were permitted to alienate prior to the expiration of the five years. A successful alienation could be accomplished only by perjury, and an attempted alienation would only offer a constant inducement to the homesteader to abandon his occupation, and thus deprive the purchaser of any possibility of acquiring title to the land; a contract whose consummation necessarily rests on perjury is illegal; both purchaser and vendor are parties to the wrong, and courts refuse to enforce such a contract, not from any regard to the vendor, but from motives of public policy; and courts of equity have always exercised a discretion in enforcing the specific performance of contracts to convey, and it would be strange indeed if a court of equity lent its aid to enforce the performance of a contract founded upon perjury and entered into in defiance of a clearly expressed will of the government. Whether the contract be absolutely void or not, it is so clearly against the will and policy of the government, and so necessarily resting upon perjury, that a court of equity will have nothing to do with it.¹

Similar views were expressed by the Supreme Court of Nebraska in the case of *Dawson v. Merrill*, 2 Neb. 119, in which it was held that "the policy of the Act of Congress granting homesteads on the public lands, as disclosed by its requirement of affidavit and other provisions, is adverse to the right of a party availing himself of it to convey, or agree to convey the land, before he receives the patent therefor;" and that "the court will not lend its aid to the enforcement of a contract which is against public

¹ *Anderson v. Corkins*, 185 U. S. 488, 84 L. ed. 272; *Mellison v. Allen*, 80 Kan. 382-384.

policy." And the judgment of the trial court, denying specific performance of a contract for the sale of lands, made by the homesteader before he had acquired the legal title to the premises, was affirmed.¹

An agreement between a person since deceased and others, for the purpose of locating as mineral land a tract larger than they were entitled to under U. S. Rev. Stat. § 2331, the names of others being used who subsequently conveyed to the parties to the agreement without consideration, is void and cannot be the basis of any relief.²

When conditions are presented by statute for the management of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the legislature in imposing the conditions was the maintenance of public order or safety, or the protection of the persons dealing with those on whom the condition is imposed.³

A contract in violation of the statute imposing a penalty for the sale of goods by unsealed scales or measure is void.⁴

A judgment obtained for services in hulling clover will be reversed where the evidence shows that the plaintiff refused to comply with the statute in regard to the protection of tumbling rods.⁵

But if no specific penalty is affixed by the statute to the particular transaction and the context shows that while the statute does not in terms declare the transaction void, the condition was simply imposed for administrative purposes, that is, to aid in the collection of the revenue or like result, the effect of the statute will not

¹*Oaks v. Heaton*, 44 Iowa, 116; *Nichols v. Council*, 51 Ark. 26.

²*Mitchell v. Oline*, 84 Cal. 409.

³*Miller v. Post*, 1 Allen, 434; *Smith v. Arnold*, 106 Mass. 269; *Prescott v. Battersby*, 119 Mass. 285; *Woods v. Armstrong*, 54 Ala. 150; *Buxton v. Hamblen*, 32 Me. 448; *Dolson v. Hope*, 7 Kan. 161; *Lewis v. Welch*, 14 N. H. 294; *Taylor v. Crowland Gas Co.* 10 Exch. 298; *Johnson v. Hulings*, 108 Pa. 498; *Solomon v. Dreschler*, 4 Minn. 278; *Hamilton v. Grainger*, 5 Hurst. & N. 40; *Griffith v. Wells*, 8 Denio, 226.

⁴*Disbee v. McAllen*, 89 Minn. 143.

⁵*Ell v. Bell*, 29 Ill. App. 186.

⁶*Niemeyer v. Wright*, 75 Va. 289; *Aiken v. Blaisdell*, 41 Vt. 655; *Mandlebaum v. Gregovich*, 17 Nev. 87; *Larned v. Andrews*, 106 Mass. 485; *Pangborn v. Westlake*, 36 Iowa, 546; *Ruckman v. Berghole*, 87 N. J. L. 487; *Lindsey v. Rutherford*, 17 B. Mon. 245.

be to avoid the act.¹ Before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty or a penalty, only for doing a thing which it forbids, the statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so.² If the statute, although it forbids a contract, declares it shall not be void if made, the court must give it effect.³

b. Penalty for Performing Marriage Ceremony.—Where a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, the marriage is valid, but the penalty attaches to the officer who did the prohibited act.⁴

c. Usury Laws.—Where a bank is limited by its charter to a specified rate of interest, but no penal consequence is denounced for taking more, it has been held that a contract for more is not wholly void.⁵

Where usurious contracts are forbidden under a penalty of forfeiture of three times the interest taken, the act of making such a contract is illegal, but to hold the contract wholly void would be to add another penalty to that imposed.⁶

d. Internal Revenue Laws.—That a wholesale dealer failed to comply with the provision of the internal revenue laws of the United States prohibiting any person from carrying on the business of wholesale dealers in merchandise until they had paid the special tax, did not invalidate the sales made by him or prevent his recovery for the goods sold.

e. Excessive Loans by Banks or Insurance Companies.—Where officers of a savings bank or insurance company invest money in a manner forbidden by statute, or loan money in contra-

¹*Harris v. Bunnels*, 53 U. S. 12 How. 79, 84, 18 L. ed. 901, 903; *Pratt v. Short*, 79 N. Y. 487; *Smith v. Lindo*, 14 C. B. N. S. 895; *Smith v. Mawhood*, 14 Mees. & W. 452.

²*McMahon v. Boden*, 89 Conn. 816; *Lewis v. Bright*, 4 El. & Bl. 917; *Vining v. Bricker*, 14 Ohio St. 881.

³*Rea v. Birmingham*, 8 Barn. & C. 29; *State v. Walker*, 86 Kan. 297; *Parton v. Horvey*, 1 Gray, 119; *Milford v. Worcester*, 7 Mass. 48.

⁴*Planters Bank v. Sharp*, 4 Smedes & M. 75; *Grand Gulf Bank v. Archer*, 8 Smedes & M. 151; *Rock River Bank v. Sherwood*, 10 Wis. 380.

⁵*Morrill v. McIntire*, 18 Gray, 157.

⁶*Aiken v. Blaisdell*, 41 Vt. 655; *Larned v. Andrews*, 106 Mass. 435.

vention of the statute, such illegal action does not render the investment worthless.¹ The requirement that a national bank shall limit its loans to any one person, firm or corporation to one tenth part of its paid capital and forbidding the taking of real estate as collateral security for original debts, does not render securities taken in violation of this statute void.²

A loan of school funds upon personal security, in a larger amount than is prescribed by statute, will not render void a note given therefor.³

f. Offering Unbranded Goods.—So it has been held that a statute declaring that all shingles offered for sale without being surveyed and marked shall be forfeited to the use of the town where offered, did not invalidate an actual sale of shingles not so surveyed or marked.⁴ So a statute which punished an "offer" to sell unbranded hay, did not render a sale of such hay invalid.⁵

g. Unlicensed Peddler, Commercial Fertilizers.—Sales by a peddler were not made illegal by reason of a penalty imposed upon him for his failure to take out a license.⁶ Where statutes required of sellers of commercial manures the observance of certain conditions, under penalty, but did not declare contracts for sale void for non-observance, it was held the non-complying seller might recover upon the contract.⁷

An action to recover for services rendered with a threshing-machine is not defeated by the Illinois statute by the fact that the tumbling rods and boxes of the machine were not boxed, unless the machine was run by horse-power.⁸

¹ *Holden v. Upton*, 184 Mass. 180; *Bowditch v. New England Mut. L. Ins. Co.* 2 New Eng. Rep. 238, 141 Mass. 292; *Lester v. Howard Bank*, 83 Md. 558.

² *National Bank of Genesee v. Whitney*, 108 U. S. 99, 26 L. ed. 443; *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Fleekner v. Bank of United States*, 11 U. S. 8 Wheat. 388-358, 5 L. ed. 631-636; *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405, 28 L. ed. 783; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648; *Swope v. Livingston*, 105 U. S. 3, 26 L. ed. 989.

³ *Edwards v. Trustees of Schools*, 80 Ill. App. 528.

⁴ *Williams v. Tappan*, 28 N. H. 385.

⁵ *Brackett v. Hoyt*, 29 N. H. 264.

⁶ *Jones v. Berry*, 88 N. H. 209.

⁷ *Niemeyer v. Wright*, 75 Va. 289, 40 Am. Rep. 720. See *Larned v. Andrews*, 106 Mass. 485; *Smith v. Mawhood*, 14 Mees. & W. 452.

⁸ *Heustis v. Kennedy*, 28 Ill. App. 42.

CHAPTER III.

MALUM IN SE AND MALUM PROHIBITUM—FOREIGN STATUTE.

- § 9. *Rule Declaring Contracts Concerning Matter "Malum in Se. and Malum Prohibitum" Void, Applies when.*
10. *The Local Policy or Statute Determines the Question of Enforcement of Foreign Contracts—State Comity.*
 11. *Enforcement of Foreign Assignments for the Benefit of Creditors.*
 12. *Questions of Commercial Law, Rule in United States Supreme Court.*

§ 9. **Rule Declaring Contracts Concerning Matter "Malum in Se and Malum Prohibitum" Void, Applies when.**—The rule that a contract made for the purpose of furthering any matter or thing prohibited by the statute, or to aid or assist any party therein, is void, applies to every contract founded on a transaction *malum in se*, or which is prohibited by statute on the ground of public policy.¹

Illegal contracts are not such only as stipulate for something that is unlawful, but where the intention of one of the parties is to enable the other to violate the law, it is corrupted by such illegal intention and is void.²

The distinction between *malum in se* and *malum prohibitum* has long since been exploded, and as "there can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal,"³ it is clear that contracts in direct violation of statutes expressly forbidding their execution cannot be enforced.⁴

"The rule of law," said Parker, *Ch. J.* in *Russell v. DeGrand*,

¹*Gardner v. Tatum*, 81 Cal. 370.

²*Tatum v. Kelley*, 25 Ark. 211; *Branch Bank v. Crocheron*, 5 Ala. 250; *Beach v. Kesar*, 1 N. H. 184; *Steele v. Curle*, 4 Dana, 381; *Girardy v. Richardson*, 1 Esp. 18; *Langton v. Hughes*, 1 Maule & S. 598; *Lightfoot v. Tenant*, 1 Bos. & P. 551; *Farmer v. Russell*, 1 Bos. & P. 296.

³*Bank of United States v. Owens*, 27 U. S. 2 Pet. 527, 539, 7 L. ed. 506.

⁴*Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 39 L. ed. 979.

15 Mass. 35, 39, "is of universal operation, that none shall, by the aid of a court of justice obtain the fruits of an unlawful bargain."

Contracts are illegal because of their tendency to promote unlawful acts without regard to any circumstances which go to affect the probability of the unlawful act being done.¹ But it has been held that a contract, innocent in itself, will not be avoided because it may by possibility facilitate an illegal transaction; to render it void the connection with the illegal transaction must be direct and not remote or conjectural.²

There is a distinction between a contract prohibited by law and one made by parties exercising a calling which is prohibited unless licensed, or one made in furtherance of an illegal business;³ thus, an ordinance making it a misdemeanor for anyone to transact business as a house and real estate agent, without a license therefor, will not prevent the enforcement of a contract between an unlicensed agent and a vendor which has been executed by the former.⁴

§ 10. The Local Policy or Statute Determines the Question of Enforcement of Foreign Contracts—State Comity.—The law of the contract, it is said, as a general proposition, travels with it, wherever the parties thereto are to be found, and into whatever forum resort is had for its enforcement.⁵

In the absence of any agreement as to the law of a contract, the law of the place of performance controls.⁶

And as a general rule, a debt or chose in action, being incorporeal, is deemed to follow the person of the owner, and to be present with him; thus, a note dated and made payable at Boston, by a resident of that place in favor of a resident of New York, in pursuance of an agreement made by the maker's agent in New York, is to be governed by the laws of New York.⁷

¹*Egerton v. Brownlow*, 18 Jur. 71; 4 H. L. Cas. 1; 33 L. J. Eq. 348.

²*De Groot v. Van Duser*, 17 Wend. 170.

³*Prince v. Eighth St. Baptist Church*, 2 West. Rep. 621, 20 Mo. App. 332; *Howell v. Stewart*, 54 Mo. 400; *Chadwick v. Collins*, 26 Pa. 138; *Michael v. Bacon*, 49 Mo. 474.

⁴*Prince v. Eighth St. Baptist Church*, 2 West. Rep. 621, 20 Mo. App. 332.

⁵*Green v. Collins*, 8 Cliff. 494; *Hill v. Spear*, 50 N. H. 262, and cases cited; *Corning v. Abbott*, 54 N. H. 469; Story, Conf. L. § 242.

⁶*Union Trust Co. v. Missouri, K. & T. R. Co.* (Kan.) 7 Ry. & Corp. L. J. 485.

⁷*Holmes v. Manning*, 150 Mass. 211.

The *situs* of a debt follows the creditor; and where the debtor and creditor reside in different states, the law of the domicile of the creditor prevails.¹

But for some purposes the courts treat such property or interests as having a *situs* at the place of the owner's domicile. It is so for the purposes of taxation, and in insolvency or other proceedings by creditors.²

And this general rule always yields when the law and policy of the State where the property is actually located, have provided a different rule of transfer from that of the State where the owner lives. Thus the policy, as shown in a statute of a State, requiring a chattel mortgage upon any boat navigating the canals, to be filed in the office of the canal commissioner, where such mortgage is not accompanied by immediate delivery and followed by actual and continued change of possession, or declaring it void as against creditors of the mortgagor, cannot be made subject to the law of the domicile of the mortgagor residing in another State.³ The residence of the attaching creditor in such case is held not material. The liability of property to be attached and sold under legal process, issuing from the courts of the State in which the property is actually situated, must be determined by the law of that State, rather than by the jurisdiction where the owner lives.⁴

The fiction of law that the domicile of the owner draws to it his personal estate yields, whenever, for the purposes of state policy or justice, the actual *situs* of the property should be examined.⁵

An assignment of personal property in Idaho, contrary to the laws of that Territory, and in accordance with the laws of Utah, where the assignor resides, will not be upheld against attaching creditors in Idaho.⁶

Nor is this fiction of law ever adopted when it would contravene local criminal laws, or would sanction vice or immorality, or is against a positive prohibition of law.⁷

¹*Birdseye v. Baker*, 2 L. R. A. 99, 82 Ga. 142.

²*Smith v. Chicago & N. W. R. Co.* 23 Wis. 269; Wharton, Conf. L. § 363; *Re Dalpay* (Minn.) 6 L. R. A. 108.

³*Keller v. Paine*, 9 Cent. Rep. 429, 107 N. Y. 83.

⁴*Warner v. Jaffrey*, 96 N. Y. 248.

⁵*Green v. Van Buskirk*, 72 U. S. 5 Wall. 307, 18 L. ed. 599.

⁶*Barnett v. Kinney*, — Idaho, —, 28 Pac. Rep. 922.

⁷*Mumford v. Canty*, 50 Ill. 370.

Contracts permissible in the locality where made, are nonenforceable elsewhere, if they contravene existing laws, or rules of morality or local policy.¹

The courtesy or comity of a State which gives to the laws of a foreign State an extra-territorial force, will not be exercised against positive statute or in opposition to the public policy of the State in which the court is acting. There are many considerations which seem to render it proper that the public policy of the State should be declared through its legislation rather than expressed through its courts; but in the absence of legislation, the duty doubtless devolves upon the court.²

No people are bound to hold valid in their courts of justice a contract which is injurious to their public rights or offends their morals, or contravenes their policy, or violates public law, and every independent community will judge for itself how far the rule of comity between states is to be permitted to interfere with its domestic interests and policy.³

A contract contrary to the public policy of the State where it

¹*Oscanyan v. Winchester Repeating Arms Co.* 108 U. S. 261, 26 L. ed. 539.

²*Story*, Conf. L. §§ 7, 88, 240, 390, 464, 512; *Pierce v. O'Brien*, 129 Mass. 814, 37 Am. Rep. 360; *Zipcey v. Thompson*, 1 Gray, 243; *Greenwood v. Curtis*, 6 Mass. 878; *Ingraham v. Geyer*, 18 Mass. 146; *May v. Breed*, 7 Cush. 15, 54 Am. Dec. 700; *Means v. Hapgood*, 19 Pick. 105; *Whipple v. Thayer*, 16 Pick. 25, 26 Am. Dec. 626; *Dehon v. Foster*, 4 Allen, 553; *Fall River Iron Works Co. v. Croade*, 15 Pick. 11; *Fox v. Adams*, 5 Me. 245; *Saunders v. Williams*, 5 N. H. 213; *Dunlap v. Rogers*, 47 N. H. 281; *Rice v. Courtis*, 32 Vt. 460; *Hanford v. Paine*, 32 Vt. 442, 78 Am. Dec. 586, 597; *Ward v. Morrison*, 25 Vt. 595; *Bishop v. Holcomb*, 10 Conn. 444; *Atwood v. Protection Ins. Co.* 14 Conn. 555; *Upton v. Hubbard*, 28 Conn. 275; *Oliver v. Towns*, 14 Mart. (La.) 97; *Hoyt v. Thompson*, 19 N. Y. 207; *Guillander v. Howell*, 35 N. Y. 657; *Willels v. Waite*, 25 N. Y. 577; *Slater v. Carroll*, 2 Sandf. Ch. 573, 7 L. ed. 708; *Fuller v. Steiglitz*, 27 Ohio St. 855, 22 Am. Rep. 312; *Bholen v. Cleveland*, 5 Mason, 174; *Le Roy v. Crowninshield*, 2 Mason, 157; *Harrison v. Sterry*, 9 U. S. 5 Cranch, 289, 8 L. ed. 104; *Theret v. Jenkins*, 4 B. Mon. 423; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 189, 19 L. ed. 109; *Thuret v. Jenkins*, 7 Mart. (La.) 815; *Brashear v. West*, 32 U. S. 7 Pet. 608, 8 L. ed. 801; *United States Bank v. Huth*, 4 B. Mon. 423; *Frazier v. Fredericks*, 24 N. J. L. 162; *Smith v. Chicago & N. W. R. Co.* 23 Wis. 267; *Lane v. Williams*, 18 Pa. 85; *Walters v. Whitlock*, 9 Fla. 86, 76 Am. Dec. 607; *Weider v. Maddox*, 66 Tex. 872, 59 Am. Rep. 617; *Milne v. Moreton*, 6 Binn. 353; *Forbes v. Scannel*, 13 Cal. 242.

³*Kent*, Com. 457, 458; *Hill v. Spear*, 50 N. H. 253, 262; *Bliss v. Brainard*, 41 N. H. 256, 258; *Jones v. Surprise*, 4 New Eng. Rep. 292, 64 N. H. 243; *Faukner v. Hyman*, 2 New Eng. Rep. 181, 142 Mass. 53; *Green v. Van Buskirk*, 72 U. S. 5 Wall. 307, 18 L. ed. 599, 74 U. S. 7 Wall. 189, 19 L. ed. 109; *Cunningham v. Butler*, 2 New Eng. Rep. 383, 142 Mass. 47; *Dehon v. Foster*, 4 Allen, 545.

is made or to be enforced, although not expressly prohibited by law, cannot be enforced.¹

The general rule is that courts will enforce contracts valid by the law of the place where made, unless they are injurious to the interests of the State or of its citizens.²

The injury may be indirect by offending against justice or morality, or by tending to subvert settled public policy.³

But this does not imply that courts will not sustain contracts that would not be valid if made within their jurisdiction, or will not enforce rights that could not be acquired there.

A mere repugnancy of a contract to a statute designed apparently alone to raise revenue is not sufficient to prevent a recovery under the contract in another State.⁴ Thus, for example, the courts of Pennsylvania have always enforced contracts for a higher rate of interest than would be valid under the laws of that State.⁵

So a contract by the proprietor of a circus, with a railroad company, for the transportation of his own cars, at a reduced rate, exempting the carrier from liability for the negligent acts of its employes, if valid under the laws of the State where it is made and is to be wholly performed, and in which the breach occurs, is enforceable in another State where such contract would be invalid under its laws, if made in its jurisdiction.⁶

The principle has been directly applied in many cases to contracts made by common carriers.⁷ In England the same result has been reached.⁸

¹*Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415.

²Story, Conf. L. §§ 88, 244.

³*Kent*, Com. 458; *Greenwood v. Curtis*, 6 Mass. 358; *Bliss v. Brainard*, 41 N. H. 256.

⁴*Angell v. Van Schaick*, 56 Hun, 247.

⁵*Ralph v. Brown*, 8 Watts & S. 395; *Wood v. Kelso*, 27 Pa. 243; *Irvine v. Barrett*, 2 Grant, Cas. 73.

⁶*Forepaugh v. Delaware, L. & W. R. Co.* 5 L. R. A. 508, 128 Pa. 217.

⁷*Brown v. Camden & A. R. Co.* 83 Pa. 316; *Brooke v. New York, L. E. & W. R. Co.* 108 Pa. 529; *Knowlton v. Erie R. Co.* 19 Ohio St. 260; *Talbot v. Merchants Despatch Transp. Co.* 41 Iowa, 247; *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470; *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 539; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Gray v. Jackson*, 51 N. H. 9; *Cantu v. Bennett*, 39 Tex. 303; *Ryan v. Missouri, K. & T. R. Co.* 65 Tex. 13. See also *First Nat. Bank v. Shaw*, 61 N. Y. 238; *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 412.

⁸*Peninsular & O. Steam Nav. Co. v. Shand*, 11 Jur. N. S. 771; *Jacobs v. Crédit Lyonnais*, L. R. 12 Q. B. Div. 569, 53 L. J. N. S. Q. B. 156.

§ 11. **Enforcement of Foreign Assignments for the Benefit of Creditors.**—As between the parties to an assignment for the benefit of creditors, if valid by the *lex loci contractus*, it would be upheld everywhere. It would also be sustained against creditors, if valid where made, and not in contravention of the law of the place where sought to be enforced, both as to property situated in the foreign jurisdiction and property within the jurisdiction of the trial court.¹

An assignment for the benefit of creditors, if valid by the law of the place of domicil of assignor, will pass all his personal property wherever situated, unless restrained by some local law or state policy of the State where the property is situated.²

A deed of trust made by a citizen of one State, of securities of foreign corporations, for the benefit of a citizen of another State, if valid by the law of the State where it was made and of the State where it is enjoyed, will not be held invalid because of the mere fact that the trustee is a corporation of a State where such trusts are invalid.³

A deed of trust executed in another State on property in Louisiana, to secure the payment of promissory notes, will be enforced as a conventional mortgage.⁴

In *Richardson v. Forepaugh*, 7 Gray, 546, a Pennsylvania assignment was held valid in Massachusetts, against a citizen of the latter State who had purchased of a citizen of Pennsylvania after the assignment, an overdue note, though without notice of the assignment. Such assignments are sustained so far as affects property which was at the time in the jurisdiction where it was made; and also as against all citizens of that jurisdiction, when seeking a remedy in another State against property found there.⁵ So also as to receivers.⁶

¹*Forepaugh v. Delaware, L. & W. R. Co.* 5 L. R. A. 508, 128 Pa. 217.

²2 Kent, Com. 455; *Thrasher v. Ewerhart*, 3 Gill & J. 234; *Pickering v. Fisk*, 6 Vt. 102; *Hanford v. Paine*, 32 Vt. 442; Story, Conf. L. 201; *Cosling v. Kelling*, 83 Ky. 649; *Ockerman v. Cross*, 54 N. Y. 29.

³*Fowler's App.* 125 Pa. 388.

⁴*Pickett v. Foster*, 36 Fed. Rep. 514.

⁵*May v. Wannemacher*, 111 Mass. 202, 209.

⁶*Bagby v. Atlantic M. & O. R. Co.* 86 Pa. 291; *Woodward v. Brooks*, 3 L. R. A. 702, 128 Ill. 222.

In *Burlock v. Taylor*, 16 Pick. 335, an assignment of personal property by a debtor in New York, valid under the laws of that State, was sustained against a subsequent attachment by a citizen of New York of property in Massachusetts, although the assignment would have been invalid if made in Massachusetts.

The courts of a State will not sustain the claim of attaching creditors, not citizens of the State whose process is invoked, in preference to the claim of an assignee obtaining title under the laws of the State of the insolvent debtor.¹

An assignment executed in another State, will not always be enforced to the manifest injury of citizens of the State in which its enforcement is sought,² and a receiver of an insolvent corporation in the State where it was created cannot claim the proceeds of a policy of insurance on its property in another State, where the loss was made payable, as against an assignee for its creditors who has been appointed in the latter State.³

The title acquired by an assignee for the benefit of creditors, although good as to the property assigned, is (as to assets in other states, whose policy it is not to recognize as against the claims of creditors of the assignee domiciled therein, the validity of general assignments with preferences) liable to be defeated by attachments sued out of the courts of such other states by creditors domiciled therein, to recover their debts out of such assets.⁴ But when declared fraudulent or invalid at the place where the property is situated they will not be sustained even if valid in the State where made;⁵ or where a different law exists.⁶

Clearly the courts of a State cannot be required to give effect to an assignment or transfer of property within it, or of debts due to its citizens, which is found to be contrary to the policy and

¹ *Cunningham v. Butler*, 2 New Eng. Rep. 338, 42 Mass. 47; *Bentley v. Whittemore*, 19 N. J. Eq. 462; *Sanderson v. Bradford*, 10 N. H. 265.

² *Daniels v. Willard*, 16 Pick. 36; *Whipple v. Thayer*, 16 Pick. 25; *Martin v. Potter*, 11 Gray, 37; *Richardson v. Forepaugh*, 7 Gray, 546; *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. 291.

³ *Platt v. Continental Ins. Co.* 62 Vt. 166.

⁴ *Kimball v. Lee*, 4 Cent. Rep. 332, 40 N. J. Eq. 403.

⁵ *Zipcey v. Thompson*, 1 Gray, 248; *Boyd v. Rockport Mills*, 7 Gray, 406; *Bryan v. Brisbin*, 26 Mo. 423; *Varnum v. Camp*, 18 N. J. L. 329.

⁶ *Edgerley v. Bush*, 81 N. Y. 199; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 139, 19 L. ed. 109. See *Howard Nat. Bank v. King*, 10 Abb. N. C. 846; *Atherton v. Ives*, 20 Fed. Rep. 896.

laws of the State. To uphold the opposite doctrine would be to encourage fraudulent contrivances to defeat the operation of local insolvent or collection laws.¹

In *Faulkner v. Hyman*, 2 New Eng. Rep. 181, 142 Mass. 53, it was held that a voluntary assignment in trust for creditors, made in New York, and valid there, is not valid in Massachusetts, against an attachment, if such an assignment is one which, if made between citizens of Massachusetts, would be inoperative for want of compliance with legal requisitions. If the suit had been brought by New York plaintiffs alone, it was conceded that they could not be heard to deny the validity of the assignment, because as citizens of New York they would be bound by its laws even in Massachusetts.² If brought by Massachusetts creditors alone, it is equally true, as the assignment is not valid by the law of Massachusetts, that the attachment would prevail. All the parties are necessarily compelled to join in the action, and the New York plaintiffs are under no disability to sue in Massachusetts. The principle of comity, it was held, did not require the Massachusetts court to enforce the New York law, different from its own, against the just rights of its own citizens and to their prejudice, because if it failed to do so, the residents of New York would incidentally obtain a benefit which they could not otherwise. A Massachusetts court is not required to deny its own citizens their lawful rights for the sake of denying to residents of New York that which could be accorded them only by reason of respect for the laws of New York, if they had brought suit alone. Considering that the other plaintiffs were residents of Massachusetts, the fact that some are residents of New York was not considered sufficient to place the Massachusetts court under a duty to enforce the New York law as to assignments.

But the rule that contracts made out of the State, which contravene the policy of the State, will be held void, does not make void an assignment for creditors merely because it does not have annexed to it the schedule required in such cases by the laws of the State, as such schedules are not parts of the contract.³

¹*Zipcey v. Thompson*, 1 Gray, 245; *Foster v. Goulding*, 9 Gray, 52, 53; *State Bank Receiver v. Plainfield Bank*, 34 N. J. Eq. 450.

²*May v. Wannemacher*, 111 Mass. 202.

³*Birdseye v. Baker*, 2 L. R. A. 99, 82 Ga. 142. See *Drucker v. Wellhouse*, 2 L. R. A. 828, 82 Ga. 129.

The Supreme Court of the United States has shown a strong disposition to follow the ruling of a state court, in which the parties resided, where the conveyance for the benefit of creditors was executed and in which the bulk of the property is situated, sustaining such conveyance, even in case of a conveyance of doubtful validity. Especially is this true where the instrument was executed with the general acquiescence of creditors, and its purpose is equality between them, and it was not challenged for years, and the trustee, on the faith of its validity, assumed large liabilities, and carried on business to an enormous extent, and the creditors accepted payment resulting therefrom. Indeed, where a debtor, having large and scattered properties, and being much embarrassed, transfers his property for the benefit of his creditors equally, equity requires that any creditor who is not satisfied with the provisions of such transfer shall act promptly in challenge thereof, or else be adjudged to have waived any right of challenge to the instrument.¹

§ 12. Questions of Commercial Law, Rule in United States Supreme Court.—But the Supreme Court of the United States has declined to be bound by the decision of a state court where such decision “is not based on a statute of the State, nor on any rule of law affecting title to lands, nor any principle which has become a settled rule of property, but on those principles of public policy designed for the protection of the State or the public, of which it must judge for itself, as the state courts do when the question is fairly presented.”²

The courts of the United States are not controlled by the decisions of state courts on questions of general commercial law.³

On any question depending upon mercantile law, and not alone on local statute or usage, the courts of the United States are not bound by the decisions of the courts of a State.⁴

Decisions of state courts are not binding upon questions con-

¹*Jencks v. The Quidnick Co.* 135 U. S. 457, 34 L. ed. 200.

²*Delmas v. Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 661, 20 L. ed. 757.

³*Brooklyn City & N. R. Co. v. Nat. Bank of the Republic*, 102 U. S. 14, 26 L. ed. 61; *Watson v. Tarpley*, 59 U. S. 18 How. 517, 15 L. ed. 509; *Mercer County v. Hackett*, 68 U. S. 1 Wall. 83, 17 L. ed. 548; *Pine Grove Twp. v. Tulcott*, 86 U. S. 19 Wall. 666, 23 L. ed. 227; *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580.

⁴*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 897, 32 L. ed. 788.

cerning contracts of insurance, those being questions of general commercial law.¹

Upon the general principles and doctrines of common jurisprudence, it is the duty of this court to form an independent judgment.²

What constitutes a contract of carriage is not a question of local law upon which the decision of a state court must control. It is a matter of general law, upon which this court will exercise its own judgment.³

The decision of the state court holding a contract invalid on grounds of public policy is not binding on the Supreme Court of the United States.⁴

If the decision of the existence of an alleged contract requires a construction of the State Constitutions and laws, this court is not necessarily governed by previous decisions of the state courts, except where they have been so firmly established as to constitute a rule of property.⁵

Subsequent fluctuations in the construction of a Statute, by the courts of the originating State or country, though they may be entitled to great respect, are not within the meaning of the rule.⁶

This principle applies with equal force to all contracts which come within its jurisdiction.⁷

In a recent case the Supreme Court of Pennsylvania has questioned this line of ruling.⁸

Plaintiff, being the proprietor of a circus, made a special contract with defendant for the transportation of a number of his own cars upon certain conditions and terms, elaborately set out in writing, among which was a stipulation that in consideration that the service was to be performed "for much less than the ordinary, usual and legal rates charged other parties for a like amount

¹*Carpenter v. Providence Wash. Ins. Co.* 41 U. S. 16 Pet. 495, 10 L. ed. 1044.

²*Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424.

³*Michigan Cent. R. Co. v. Myrick*, 107 U. S. 102, 27 L. ed. 825.

⁴*Delmas v. Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 661, 20 L. ed. 757.

⁵*Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 923.

⁶*Cathcart v. Robinson*, 30 U. S. 5 Pet. 264, 8 L. ed. 120; *Endlich*, Interpretation of Statutes, 519.

⁷*Corroll Co. v. U. S.* 18 Wall. 71, 21 L. ed. 771; *Fairfield v. Gallatin Co.* 100 U. S. 53, 25 L. ed. 546; *Douglass v. Pike Co.* 101 U. S. 685, 25 L. ed. 971.

⁸*Forepaugh v. Delaware, L. & W. R. Co.* 5 L. R. A. 508, 128 Pa. 217.

of transportation," the plaintiff released the defendant from all liability for or on account of loss, damage or injury to any of the animals, property or things thus transported, "although such loss, damage or injury may be caused by the negligence of the (defendant), its agents or employés." Damage having occurred by the negligence of defendant, plaintiff brought this suit, and the sole question was whether it could be maintained in the face of the stipulation above set forth.

The contract was made, was to be performed, and the alleged breach occurred in New York. No possible element was wanting, therefore, to make it a New York contract. It is admitted that in New York the stipulation is valid, and this action could not be maintained.¹

Why, then, it is asked, should plaintiff, by stepping across the boundary into Pennsylvania, acquire rights which he has not paid for, and his contract does not give him?

It is argued that the validity of this contract is a question of commercial law, and therefore the mere decisions of the New York courts are not binding, and in the absence of any statute in New York expressly authorizing such a contract, the courts of this State must follow their own views of the commercial, as part of the general common law, though different views may be held as to such law by the courts of New York.

As this argument is one which is frequently advanced, and affects a number of important questions, it is, the court announces, time to say plainly that it rests upon an utterly inadmissible and untenable basis. The court deny that there is such a thing as a general commercial or general common law, separate from and irrespective of a particular State or government whose authority makes it law. It is said that law is a rule prescribed by the sovereign power. By whom, it is asked, is a general commercial law prescribed, and what tribunal has authority or recognition to declare or enforce it outside of the local jurisdiction of the government it represents? Even the law of nations, the widest reaching of all, is said to be a law only in name. It has but a moral sanction, and the only tribunal that undertakes to enforce it is the

¹*Orafin v. New York Cent. R. Co.* 51 N. Y. 61; *Maynard v. Syracuse, B. & N. Y. R. Co.* 71 N. Y. 180; *Wilson v. New York Cent. & H. R. R. Co.* 97 N. Y. 87.

armed hand, the *ultima ratio regum*. The so-called commercial law is likewise a law only in name. Upon many questions arising in the business dealings of men, the laws of modern civilized states are substantially the same, and it is therefore common to say that such is the commercial law, but, except as a convenient phrase, such general law does not exist. There must be a State, or government, of which every law can be predicated, and to whose authority it owes its existence as law. Without such sanction it is not law at all; with such sanction it is law without reference to its origin or the concurrence of other states or people. Such sanction it is the prerogative of the courts of each State itself to declare. Their jurisdiction is final and exclusive, and in this respect there is no distinction between statute and common law. It is universally conceded that, as to statutes, the decisions of the state courts are binding upon all other tribunals; yet such decisions have no higher sanction than those upon the common law, for what the latter determine, equally with the former, is the law of the particular State.

The law of a State consists, it is said, of the Constitution, treaties, and statutes of the United States, the Constitution and statutes of the State, and the common law, not of any or all other counties, but of that State. There is a common law of England, and a common law of the State mainly founded thereon, but with certain differences, and the only tribunal competent to pass authoritatively on such differences is the state court. This familiar illustration is used. In the United States the universal doctrine has always been that the English colonists brought with them, and made part of their laws, all the common law of England that was not unsuited to their new situation. No part of the common law of England is better settled than the doctrine of ancient lights. The Court of Chancery of New Jersey, in *Robeson v. Pittenger*, 2 N. J. Eq. 57 (1838), held that the same doctrine was part of the common law of New Jersey. The Supreme Court of Pennsylvania, on the other hand, starting with the same premises, and reasoning on the same principles, but proceeding cautiously from the dictum of Rogers, *J.*, in *Hoy v. Sterrett*, 2 Watts, 331 (1834), to the unanimous decision of the court in *Haverstick v. Sipe*, 33 Pa. 368 (1859), held that the doctrine of ancient lights

by prescription was not part of the common law of Pennsylvania. No tribunals of any other State presumed to question that the common law of New Jersey and the common law of Pennsylvania differ on this point. What is law in one State is not law in the other, not because it was or was not the common law of England, but because it is or is not the law of the respective states. And, though it rests only on the decisions of the courts, it is none the less absolutely and indisputably the law than if it had been made so by statute.

It is insisted the so-called commercial law derives all its force from its adoption as part of the common law, and a decision on the commercial law of a State stands upon precisely the same basis as a decision upon any other branch of the common law, and that the only ground upon which any foreign tribunal can question either, is that it does not agree with the premises or the reasoning of the court. But the same ground, it is argued, would enable it to question a decision upon a statute because a different construction seemed to it nearer the true intent of the legislative language, and this it is universally conceded no foreign court can do. There is no difference, it is claimed, in principle. The decisions of a state court upon its common law and on its statutes must therefore, it is said, stand unquestioned, because it is the only authority competent to decide, or they must be alike questionable by any tribunal which may choose to differ with its reasons or its conclusions. Mitchell, *J.*, who pronounced the opinion, declares that it is not probable that the doctrine of such a distinction would ever have got a foothold in jurisprudence, and it would certainly have been long ago abandoned, had it not been for what he calls the unfortunate misstep that was made in the opinion in *Swift v. Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865. Since then the courts of the United States have, he says, persisted in the recognition of a mythical commercial law, and have professed to decide so-called commercial questions by it in entire disregard of the law of the State where the question arose. To the proposition that as to such questions the state courts also have similar liberty, he replies that it would be sufficient answer that such a course, by reading into a contract a new duty not in contemplation of the parties, and not part of it by the law of the place where it is

made, is in principle and in practical effect impairing the obligation of the contract, which even the sovereign power of a State is prohibited from doing. But he rests the decision on the broader ground that the doctrine itself is unsound.

It is asserted that the best professional opinion has long regarded it as indefensible on principle, and is thus very recently summed up by the opinion of Stytes, "one of the most learned of living jurists": "Questions growing out of contracts made and to be performed in a State are decided by the national court of last resort, not in accordance with the customary or unwritten law of the State where they originated, as expounded by its courts, but agreeably to some theoretic view of a general commercial law, which does not exist, and is not to be found in the books. The state courts, on the other hand, adhere to their own precedents, and do not consider themselves entitled to impair the obligation of contracts that have been made in reliance on the principles which they have laid down through a long series of years. The result is a conflict of jurisdiction which there are no means of allaying. . . . Whether a recovery shall be had on a promissory note, which has been taken as collateral security for an antecedent debt against a maker, from whom it was obtained by fraud, is thus made to turn in New York, Pennsylvania and Ohio, not on any settled rule, but on the tribunal by which the cause is heard; and if that is federal, the plaintiff will prevail; if it is local, the defendant. Such a result tends to discredit the law. . . . The enumeration might be carried further, but enough has, perhaps, been said to show that no uniform rule can be deduced from the decisions of the English and American courts under the commercial law, and that the certainty requisite to justice can be obtained only by following the local tribunals as regards the contracts made in each locality.

"The several states of this country are collectively one nation, but they are as self-governing in all that concerns their purely internal commerce as if the general government did not exist; and when the will of the people of New York or Pennsylvania is declared on such matters through their representatives in the local legislatures, expressly, or by long continued acquiescence in the rules enunciated by their judges, it cannot be set aside by Con-

gress short of an amendment of the Constitution. Had the New York Legislature declared that notes made and negotiated in that State should follow the rule laid down in *Coddington v. Bay*, 20 Johns. 637, the federal tribunals would have been bound to carry it into effect, notwithstanding any attempt of the national Legislature to introduce a different principle; and it is inconceivable that the judicial department of the government can exercise a greater authority in this respect than the legislative."¹

The opinion concludes that the distinction recognized by the federal court between the binding effect of decisions on commercial law, and on statutes, is utterly untenable; that the law declared by state courts to govern on contracts made within their jurisdiction is conclusive everywhere; and the departure made by the United States courts is to be regretted and certainly not to be followed.

In entire accordance with this view, are, it is insisted, the Pennsylvania cases of *Brown v. Camden & A. R. Co.* 83 Pa. 316, and *Brooke v. New York, L. E. & W. R. Co.* 108 Pa. 530; and the decisions in Ohio, *Knowlton v. Erie R. Co.* 19 Ohio St. 260; in Illinois, *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Milwaukee & St. P. R. Co. v. Smith*, 74 Ill. 197; in Iowa, *Talbott v. Merchants Despatch Transp. Co.* 41 Iowa, 247; *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470; in Connecticut, *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 539; in Kansas, *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 632; in South Carolina, *Bridger v. Asheville & S. R. Co.* 27 S. C. 462; in Georgia, *Atlanta & C. A. L. R. Co. v. Tanner*, 68 Ga. 390; in Mississippi, *McMaster v. Illinois Cent. R. Co.* 65 Miss. 271; in Texas, *Cantu v. Bennett*, 39 Tex. 303; *Ryan v. Missouri, K. & T. R. Co.* 65 Tex. 13; and perhaps in other states.

These cases are not noticed in detail, further than to quote the terse and forcible summary made by Scott, J., in *Knowlton v. Erie R. Co.* 19 Ohio St. 260: "As the contract was made within the jurisdiction of New York, and contemplated no action outside of that jurisdiction, it is clear that the question of its validity must be determined solely by the laws of New York. The rights and obligations of the parties to such a contract, and in respect to the

¹ Hare, Const. pp. 1107, 1117, and see Lecture 51, *passim*.

manner of its execution, cannot be affected by the laws or policy of other states. If no cause of action arose to the plaintiff under his contract when the accident occurred, the transaction cannot be converted into a cause of action by the fact that the parties have subsequently come within the jurisdiction of Ohio.

The result of the decision is that as the validity of the contract is to be determined by the law of New York, as decided by the courts of that State, there is no reason why the courts of Pennsylvania should not enforce it, for the general rule is, that courts will enforce contracts valid by the law of the place where made, unless they are injurious to the State, or to its citizens.¹

The contract in question, it is said, does not directly affect the State or its citizens in any way, nor is it in any way contrary to justice or morality. It is even doubted whether it is so far contrary to the policy of the State that it would have been invalid if it had been made in Pennsylvania. It is admitted that it had some exceptional features, which, it might be argued, take it out of the ordinary rule governing the contracts of common carriers, and the case of *Coup v. Wabash, St. L. & P. R. Co.*, 56 Mich. 111, is a strong authority for that position. But without stopping to discuss that point, which the general view adopted renders unnecessary, it was considered sufficient to say that even if it would not have been valid if made in Pennsylvania, its enforcement as a New York contract does not in any way derogate from the laws of Pennsylvania, or injure or affect the policy of the State, any more than would a foreign contract for what would be usurious in Pennsylvania, and that the courts have never hesitated to enforce.

So far as the decision can be considered as yielding state policy to comity, if it can be so regarded, while the opinion expressly disclaims such a concession, its force is weakened by the fact that Paxson, *Ch. J.*, and Clark, *J.*, were absent, and Sterrett united in the following dissent of Williams, *J.*: "I dissent from the judgment in this case because I cannot agree that a well settled rule of public policy of this Commonwealth must give way to considerations of mere comity. The contract set up as a defense to this action is a release to a common carrier from liability for its own

¹Story, *Conf. L.* §§ 38, 244.

negligence. It is well settled in this State that such a release is against public policy. Comity does not require more of us than to give effect to the *lex loci contractus* when not subversive of the public policy of our own State. This has been distinctly held by the Court of Appeals of New York,* in which this release was executed, and in whose behalf comity is asked. I would follow the Court of Appeals, because comity can require no more of us in any given case than the courts of the place of the contract would yield to us for comity's sake; and because I believe the rule to rest on solid ground."

*NOTE.—The case referred to is doubtless *Keller v. Paine*, 9 Cent. Rep. 429, 107 N. Y. 88.

CHAPTER IV.

WAR AS AFFECTING CONTRACTS.

- § 13. *Dealings with Public Enemy.*
a. *Duty of Citizen to Avoid.*
b. *Executory Contracts Canceled by War.*
c. *Contracts with, Void.*
14. *No Power to Appoint Agent after Hostilities.*
15. *Licenses to Trade.*
a. *May be Given to Alien Enemy.*
b. *Liberally Construed.*
16. *Insuring the Property of a Public Enemy.*

§ 13. Dealings with Public Enemy.

a. **Duty of Citizen to Avoid.**—The duty imposed upon the citizen of sustaining the government which protects him in his social rights, establishes the rule, as courts and jurists everywhere agree, that all trading in time of war with the public enemy, unless by permission of the sovereign, is interdicted when war is declared or duly recognized by the belligerent parties.¹

As soon as war is commenced, all trading, negotiation, communication or intercourse between the citizens of the belligerent countries must cease, unless authorized by the direct permission of the sovereign power.²

b. **Executory Contracts Canceled by War.**—All contracts made with an enemy during war are utterly void.³

¹*McKee v. United States*, 75 U. S. 8 Wall. 163, 19 L. ed. 329; *Hanger v. Abbott*, 73 U. S. 6 Wall. 532, 18 L. ed. 939; *The Hoop*, 1 C. Rob. 196; *Scholefield v. Eichelberger*, 32 U. S. 7 Pet. 586, 8 L. ed. 793; *Exposito v. Bowden*, 7 El. & Bl. 779; *Griswold v. Waddington*, 15 Johns. 57, 16 Johns. 449; 3 Phill. Ins. L. 108; *White v. Burnley*, 61 U. S. 20 How. 235, 15 L. ed. 886.

²*Lasere v. Rochereau*, 84 U. S. 17 Wall. 439, 21 L. ed. 695; *Desmare v. United States*, 10 Ct. Cl. 893; *Philips v. Hatch*, 1 Dill. 578; *Planters Bank v. St. John*, 1 Woods, 589; 1 Chit. Com. Law, 379; 1 Duer, Ins. 419, *United States v. Grossmayer*, 76 U. S. 9 Wall. 72, 19 L. ed. 627; *Mitchell v. United States*, 88 U. S. 21 Wall. 850, 22 L. ed. 584; *Kershaw v. Kelsey*, 100 Mass. 576.

³*Vattel*, Law of Nations, § 220; *United States v. Grossmayer*, 76 U. S. 9 Wall. 72, 19 L. ed. 627; *Montgomery v. United States*, 82 U. S. 15 Wall. 395, 21 L. ed. 97; *United States v. Lapene*, 84 U. S. 17 Wall. 601, 21 L. ed. 693; *Brown v. United States*, 12 U. S. 8 Cranch, 110, 3 L. ed. 504.

Executory contracts, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war.¹

Under an attempted purchase from an enemy of enemy's property during war, no title can be acquired.²

c. Contracts with, Void.—Where a citizen of New Orleans, after its subjugation by the federal forces, went within the rebel lines, engaged actively in the service of the rebel government, and while so engaged acquired the ownership of cotton, his contracts for the cotton were illegal and void.³

Contracts by the British consul at New Orleans, made during the civil war, to cause cotton to be protected and transported from place to place within the insurgent lines to New Orleans were void.⁴

A sailing license issued by one in command of a hostile fleet, within the territory of the belligerent, will be evidence of such illegal trading as will authorize the latter to condemn the vessel using the license.⁵

The payment of money by the subject of one of the belligerents, in the country of another is condemned, and all contracts and securities looking to that end are illegal and void.⁶

So of a bill of exchange drawn by an alien in an enemy's country during a war, on a subject of the other belligerent at his home. It cannot be collected after peace.⁷

§ 14. No Power to Appoint Agent after Hostilities.—After hostilities have actually commenced, an individual in one territory has no power to appoint an agent for any purpose in the other hostile territory.⁸

A resident, however, of the territory of one belligerent, may

¹*Hanger v. Abbott*, 73 U. S. 6 Wall. 532, 18 L. ed. 939.

²*Montgomery v. United States*, 83 U. S. 15 Wall. 395, 21 L. ed. 97; *United States v. Lapene*, 84 U. S. 17 Wall. 601, 21 L. ed. 693; *Mitchell v. United States*, 88 U. S. 21 Wall. 350, 22 L. ed. 584.

³*Desmare v. United States*, 93 U. S. 605, 23 L. ed. 959.

⁴*Hall v. Coppell*, 74 U. S. 7 Wall. 548, 19 L. ed. 245.

⁵*The Julia*, 12 U. S. 8 Cranch, 181, 3 L. ed. 528.

⁶*Griswold v. Waddington*, 16 Johns. 459.

⁷*Antoine v. Morshead*, 6 Taunt. 237.

⁸*United States v. Grossmayer*, 76 U. S. 9 Wall. 72, 19 L. ed. 627.

have, in times of war, an agent residing in the territory of the other belligerent, to whom his debtor must pay the debt or deliver property in discharge of it. Such payments on deliveries involve no intercourse between enemies.¹

A devise to an alien enemy vests a title in the devisee which is good until office found.²

A bequest to an alien enemy is good, and after peace can be enforced.³

Parties within an enemy's country, engaged in hostility to their own government, may transfer and receive the title to real property situated within the limits of their own government.⁴

§ 15. Licenses to Trade.

a. May be Given to Alien Enemy.—License may be granted by the proper authority to trade with the public enemy. Trading with the enemy, except by license, subjects the property to confiscation. This rule applies to allies. The interposition of a prior neutral port does not relieve the illegality.⁵

b. Liberally Construed.—Where a license is issued even to an alien enemy, to trade, it must be liberally construed to carry out the purpose of the grant, and its terms are not to be limited by construction, where the adventure contemplated has been fairly and reasonably carried out.⁶

A license of this nature, legalizing a particular venture, incidentally legalizes all the measures necessary to be used for its prosecution; it impliedly allows a person whose commerce is authorized, although he be an alien enemy, to protect his interest by insurance, and an agent of the power granting the license to an alien enemy, in whose name the insurance is effected, may

¹ *Montgomery v. United States*, 82 U. S. 15 Wall. 400, 21 L. ed. 97.

² *Fairfax v. Hunter*, 11 U. S. 7 Cranch, 603, 3 L. ed. 453.

³ *Atty-Gen. v. Weeden*, Park. Exch. 267.

⁴ *Conrad v. Waples*, 96 U. S. 279, 24 L. ed. 721.

⁵ *Jecker v. Montgomery*, 59 U. S. 18 How. 110, 15 L. ed. 311; *Madonna Della Gracie*, 4 Rob. 195.

⁶ *The Cosmopolite*, 4 C. Rob. 8; Grotius, b. 3, chap. 21, § 14; *The Abigail Stewart's Vice Adm.* 860; *Schroeder v. Vaz*, 15 East, 62, 3 Campb. 84, note; 1 Edward, Adm. 95.

bring an action upon the policy even during the continuance of the war.'

§ 16. **Insuring the Property of a Public Enemy.**—Insuring the property of a public enemy is condemned by all publicists who have discussed the question, as well the earliest as the latest. Valin (liv. 3, title 6, art. 3), Emérigon (tom. 1, 128), and Bynkershoek (2 Juris. Pub. chap. 21), are not less emphatic than Wheaton (Dana, Wheat. § 317), and Phillimore (vol. 5, 109). Such also is the rule of the common law.²

A distinction was taken in *Bell v. Gilson*, 1 Bos. & P. 345, where it was held that the insurance of goods purchased in an enemy's country during war, by a British agent, and shipped for British subjects, was lawful insurance. But in *Furtado v. Rogers*, 3 Bos. & P. 191, every distinction of that kind was abandoned, and in case of French property, previous to war, insurance was held not to cover a loss by British capture after the war was renewed, even though the action was not brought until after peace was declared.³ The ordinances of Barcelona, as early as 1484, declared such insurance void.⁴

Bynkershoek, discussing this question, concludes that the very fact and reason of the existence of war absolutely forbids the insurance of enemy's property, because by assuming such risks, we promote the maritime commerce of the enemy. Valin considered that insuring enemy's property and trading with the enemy

¹*Kensington v. Inglis*, 8 East. 278; *Flindt v. Scott*, 5 Taunt. 705; *De Tastet v. Taylor*, 4 Taunt. 248; *Payle v. Bourdillon*, 3 Taunt. 546; *Hullman v. Whitmore*, 3 Maule & S. 337; *Willison v. Patterson*, 7 Taunt. 448; *Uspari-cha v. Noble*, 18 East. 832; *Morgan v. Oswald*, 3 Taunt. 568; *Flindt v. Scott*, 5 Taunt. 700, 701; Edw. Lead. Dec. Brit. Luc. 20; *Rucher v. Ausley*, 5 Maule & S. 25; *Anthony v. Moline*, 5 Taunt. 711, 715; *Schnakoneg v. Andrews*, 5 Taunt. 716, 719; *Robinson v. Morris*, 5 Taunt. 720; *Bazett v. Meyer*, 5 Taunt. 824, 828, 829; *Fiese v. Bell*, 4 Taunt. 4; *Robinson v. Tou-ray*, 1 Maule & S. 217, 3 Campb. 158; *Hagedorn v. Reed*, 1 Maule & S. 567. But see *Hagedorn v. Bazett*, 2 Maule & S. 100, as to which see observations 5 Maule & S. 31; *Mennet v. Bonham*, 15 East. 477; *Flindt v. Crockett*, 15 East. 522.

²*Brandon v. Nesbitt*, 6 T. R. 23; *Potts v. Bell*, 8 T. R. 548; *Furtado v. Rogers*, 3 Bos. & P. 191.

³8 Kent, Com. 254.

⁴Consulat de la Mer, per Boucher, tome 2, 717. See also Le Guidon, chap. 2, § 5, in Cleirac, Us et Contumes de la Mer, 197, edit. 1671. Ord. of Stockholm, 1756; 2 Magen, 257. Ord. of States General of the Netherlands, in 1622, 1657, 1665, and 1689. Cited in Bynk. Quaes. J. Pub. lib. 1, chap. 21. Emerigon, des Ass. tome 1, 128.

was substantially the same thing.¹ As to how far a foreign domicil communicates to a citizen the disabilities of an alien enemy, see 1 Kent, Com. § 4.

Such contracts are not only illegal and void, but repugnant to every principle of public policy. The law will not permit one under the obligations of patriotic duty, to subject himself to such a temptation to disloyalty. A subject in time of war, cannot without license from his government, bring home even in a neutral vessel, goods purchased in the enemy's port after the commencement of hostilities.²

A policy of insurance entered into in the name of a British subject, as trustee for the persons interested, though the property insured is of British manufacture and exported from that country, cannot be enforced under the law of England.³ Even if the contracting parties are ignorant, at the time of entering into the contract, of the existence of the war, the rule is the same.⁴ Although the war breaks out after the effecting of the policy and after the commencement of the risk, yet in no instance can the policy be enforced, or the interest insured be protected while it remains impressed with the character of hostility.⁵

¹Valin, Com. tome 2, 32.

²*Potts v. Bell*, 8 T. R. 548.

³*Brandon v. Nesbitt*, 6 T. R. 23; *Bristow v. Towers*, 6 T. R. 35; *Kensington v. Inglis*, 8 East, 289, 290; *Ex parte Lee*, 18 Ves. Jr. 64.

⁴*Oom v. Bruce*, 12 East, 225.

⁵*Brandon v. Ourling*, 4 East, 410; *Gamba v. Le Mesurier*, 4 East, 407; *Kellner v. Le Mesurier*, 4 East, 403, 404; *Touteng v. Hubbard*, 3 Bos. & P. 299-301; *Lubbock v. Potts*, 7 East, 451; *Flindt v. Waters*, 15 East, 265, 9 East, 292; *Planche v. Fletcher*, Dougl. 251; Dic. of Lord Mansfield, *contra*; *Furtado v. Rodgers*, 3 Bos. & P. 201, confines the doctrine to losses by British capture. Abb. Shipp. 439, 440. But see cases *supra*. In *Butterfield v. Windle*, 2 East, 385, the objection was not taken.

CHAPTER V.

PRIVATE CONTRACTS AND CIVIL GOVERNMENTS.

§ 17. *Contracts Affecting Injuriously the Operations of the Government.*

18. *Contracts Contingent upon Ministerial Action.*

19. *Contracts to Influence Legislation.*

20. *Contracts Influencing Elections or Appointments.*

21. *Contracts Obstructing Public Justice—Maintenance and Champerty.*

22. *Contracts to Influence the Action of Corporations.*

§ 17. **Contracts Affecting Injuriously the Operations of the Government.**—A contract which looks to the injury of the public service is void, as contravening the interest which the public have in the proper performance of that service.¹

All agreements for pecuniary consideration to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution.²

A person who assists a public officer in depriving the public of the benefits of a statutory protection designed to guard the people against unfit and incompetent school teachers has no standing in court, and his assignee will receive no greater consideration.³

Agreements whereby the due performance of public duties is endangered or prevented are illegal.⁴

¹*Ray v. Mackin*, 100 Ill. 246; *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 868.

²*Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 868. But as to appointments, see *Phelan v. New York*, 88 N. Y. S. R. 805.

³*Goose River Bank v. Willow Lake School Twp.* (N. D.) 44 N. W. Rep. 1002.

⁴*Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 32 L. ed. 979; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Hartford & N. H. R. Co. v. N. Y. & N. H. R. Co.* 3 Robt. 411; *Stanton v. Allen*, 5 Denio, 434; *Charlton v. Newcastle & O. R. Co.* 5 Jur. N. S. 1096; *St. Louis v. St. Louis Gas Light Co.* 5 Mo. App. 484; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 643, 32 L. ed. 819; *Burke v. Child*, 88 U. S. 21

Personal influence to be exercised over an officer of the government for the procurement of contracts is not a vendible article.¹ A contract which contemplates the use of personal influence or solicitation with municipal authorities to procure a contract from the city is void as against public policy.²

But a contract to pay a lawyer a certain sum to appear before the street commissioners, and advocate the laying out of a street through land of the promisor, and to get as much as he can as damages therefor, is not against public policy, but it is a valid contract, which will not be invalidated by evidence tending to show the subsequent use by the lawyer of his personal influence as chairman of the city committee of a political party in fulfilling his part of the contract.³

An agreement to induce a public officer to do an illegal act or to neglect his duty is void.⁴

Where a city officer corruptly agrees with another person that the latter shall buy certain property selected by a board of which the officer is a member as suitable for a certain public purpose, and that the officer shall use his influence to induce the board to purchase it from the other at an advanced price, the profits to be divided between them; and the fraud is consummated by means of the information given by the officer and his influence with the board,—they are alike liable to the city for the injury sustained.⁵

Wall, 441, 22 L. ed. 623; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Woodruff v. Berry*, 40 Ark. 261; *Craft v. McConoughy*, 79 Ill. 346; *Hooker v. Vandewater*, 4 Denio, 849; *Central R. Co. v. Collins*, 40 Ga. 583.

¹*Oscanyan v. Winchester Repeating Arms Co.* 108 U. S. 261, 26 L. ed. 589; *Beal v. Polhemus*, 10 West. Rep. 885, 67 Mich. 130; *Brown v. Brown*, 34 Barb. 536; *Gray v. Hook*, 4 N. Y. 449; *Sedgwick v. Stanton*, 14 N. Y. 294; *Lyon v. Mitchell*, 36 N. Y. 241; *Mills v. Mills*, 40 N. Y. 548; *Fuller v. Dame*, 18 Pick. 472; *Frost v. Belmont*, 6 Allen, 152; *Harris v. Roof*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 372; *Wilbur v. New York Electric Const. Co.* 26 Jones & S. 539; *Ballaire Goblet Co. v. Findley*, 5 Ohio C. C. 418.

²*Wilbur v. New York Electric Const. Co.* 35 N. Y. S. R. 81.

³*Barry v. Capen*, 6 L. R. A. 808, 151 Mass. 99.

⁴*Hodsdon v. Wilkins*, 7 Me. 118; *Denny v. Lincoln*, 5 Mass. 385; *Churchill v. Perkins*, 5 Mass. 541; *Newsom v. Thighen*, 30 Miss. 414; *Fanshor v. Stout*, 4 N. J. L. 319; *Satterlee v. Jones*, 3 Duer, 102; *Doty v. Wilson*, 14 Johns. 881; *Richardson v. Crandall*, 48 N. Y. 848; *Devlin v. Brady*, 36 N. Y. 531; *Webbers v. Blunt*, 19 Wend. 188.

⁵*Boston v. Simmons*, 6 L. R. A. 629, 160 Mass. 461.

An agreement for compensation, to procure a contract from the government to furnish its supplies, cannot be enforced by the courts, it being against public policy.¹

A contract by a municipal corporation to pay a public officer a percentage compensation, in addition to, or instead of that prescribed by law, is against public policy and void.² But a contract made pursuant to an Act to secure a fuller and better return of property for taxation, and to prevent omissions of property from the tax duplicate, is valid.³

A promissory note given by a defaulting outgoing county treasurer to his successor, upon condition that action should not be brought on his official bond, is supported by a good consideration.⁴

Every citizen has a right of access to the official records and to use them for any legitimate purpose; and an agreement made by a circuit clerk and recorder of the county, stipulating that he should exclude others than the party with whom he was contracting, from using the records for the purpose of making out an abstract of title, or using his influence to prevent and hinder their free use, is void, as being in contravention of public policy. A recovery cannot be had on a promissory note given in consideration of such agreement.⁵

§ 18. **Contracts Contingent upon Ministerial Action.**—Contracts, the performance of which is made contingent on administrative or ministerial action, are, however, sustained, except when the contingency has been connected with some promise to induce such action by fraudulent and corrupt influence.⁶

¹*Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 868; *Garman v. Maloney* (D. C.) 9 Cent. Rep. 520.

²*Adams County v. Hunter*, 6 L. R. A. 615, 78 Iowa, 328.

³*State v. Orites*, 48 Ohio St. —.

⁴*Sac County v. Hobbs*, 73 Iowa, 69. See note to *First Presb. Church v. Cooper* (N. Y.) 3 L. R. A. 468. See *United States v. Windom*, 137 U. S. 636, 34 L. ed. 811; but see *Lake Fork Special Drainage Dist. Comrs. v. People*, — Ill. — 27 N. E. Rep. 857.

⁵*Parsons v. Randolph*, 4 West. Rep. 863, 21 Mo. App. 353; *Nash v. Lathrop*, 1 New Eng. Rep. 918, 143 Mass. 29; *Re Gould*, 1 New Eng. Rep. 925, 53 Conn. 415.

⁶*Sedgwick v. Stanton*, 14 N. Y. 294; *Howland v. Coffin*, 47 Barb. 663; *Southard v. Boyd*, 51 N. Y. 179; *State v. Johnson*, 52 Ind. 197; *Cumberland Valley R. Co. v. Baab*, 9 Watts, 458; *Berryman v. Cincinnati S. R. Co.* 14 Bush, 755; *Stanton v. Embry*, 63 U. S. 548, 23 L. ed. 983; *Denison v. Crawford Co.* 48 Iowa, 215; *Bohm v. Goldstein*, 58 N. Y. 634; *Hunt v. Test*, 8 Ala. 713.

The right to sell and dispose of property is an essential element of ownership. The appearance of a party before the heads of departments for such purpose, in person or by agent, is proper and necessary for the administration of the government. Government property cannot, in any other way, be leased, bought or sold.¹ The rule is that the law will not presume a contract void as against public policy if it is capable of a construction making it valid.²

A promissory note payable on condition that the payee shall erect a building at a point designated in a city and that the building, as designated, shall be occupied as a post-office, where the court found the contract was a valid one and for a valuable consideration without fraud on the part of the payee, and that it was not in contravention of any law or contrary to public policy, and that, in seeking the post-office to be located in the building, the payee used no undue influence upon any departments or officer of the government, and was not guilty of any corruption or corrupt practice in making such contract,—was sustained as a valid contract.³

But a contract to pay a certain sum to induce the retention of a postoffice at a given point for individual or private benefit or gain is said to be against public policy.⁴

Contracts for the location of a county-seat are not void as against public policy because individuals directly interested held out inducements, by way of donations of land or money, to influence the action of those charged with the duty of making the selection.⁵

Though an agreement to indemnify an officer for doing an unlawful act, or contract to indemnify an officer for neglecting his duty, is void,⁶ yet a bond to save an officer harmless for an unlawful act already done is valid.⁷

¹*Lyon v. Mitchell*, 86 N. Y. 249; *Howland v. Coffin*, 47 Barb. 662, 663; *Southard v. Boyd*, 51 N. Y. 177; *Winpenny v. French*, 18 Ohio St. 469.

²*Kling v. Fries*, 38 Mich. 275, 279; *Ourtie v. Gokey*, 68 N. Y. 300; *Ormes v. Dauchy*, 82 N. Y. 443; *Lorillard v. Clyde*, 86 N. Y. 384.

³*Beal v. Polhemus*, 10 West. Rep. 887, 87 Mich. 180.

⁴*Woodman v. Innes*. — Kan. —, 27 Pac. Rep. 125.

⁵*Beham v. Ghio*, 75 Tex. 87.

⁶*Hodsdon v. Wilkins*, 7 Me. 118; *Churchill v. Perkins*, 5 Mass. 381; *Ayer v. Hutchins*, 4 Mass. 371; *Pierce v. Chase*, 8 Mass. 487.

⁷*Hackett v. Tilley*, Holt, 201, 11 Mod. 93, 2 Ld. Raym. 1207; *Fox v. Tilly*, 6 Mod. 225; *Green v. Driggs*, 1 Cal. 450, 460; *Hall v. Huntton*, 17 Vt. 244; *Metcalf*, Cont. (Heard's ed.) 284.

§ 19. **Contracts to Influence Legislation.**—Persons who are personally interested in pending legislation, are not guilty of a breach, either of morals or of the law in calling the attention of the members of the legislative body to the measure whose passage they desire, nor can personal solicitation, within the bounds of moderation, unaccompanied by any promise of reward, be justly criticised.¹

While a contract for the employment of a person to present a measure pending before the Legislature, or to be presented before it, is legitimate, where it involves the presentation before a committee, of facts and arguments favorable to such legislation, and may be fairly sustained, yet an attempt to secure legislative action or to influence the action of the executive or judicial officers by personal influence or solicitation, is against public policy; and all contracts and promises of reward for such services are void.²

A contract for the performance of lobby service for another for a consideration is against public policy and void.³

A contract founded on an agreement to obtain signatures for a protest, or to procure the passage of an Act of the Legislature by using personal influence, is void.⁴

A contract by which one party stipulates to employ a number of secret agents, in order to obtain the passage of a particular law, in consideration of a large sum of money, is void.⁵

¹*Gulick v. Ward*, 10 N. J. L. 102; *Harris v. Simonson*, 28 Hun, 818; *Pingry v. Washburn*, 1 Aik. 264; *Fuller v. Dame*, 18 Pick. 472; *Clippinger v. Hepbaugh*, 5 Watts & S. 815.

²*Lyon v. Mitchell*, 86 N. Y. 241; *Mills v. Mills*, 40 N. Y. 546, 86 Barb. 474; *Gray v. Hook*, 4 N. Y. 449; *Providence Tool Co. v. Norris*, 6 U. S. 2 Wall. 45, 17 L. ed. 868; *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 814, 14 L. ed. 953; *McKee v. Cheney*, 52 How. Pr. 144; *Edwards v. Grand Junction R. Co.* 1 Myl. & C. 650; *Harris v. Roof*, 10 Barb. 489; *Ross v. Truax*, 21 Barb. 361; *Powers v. Skinner*, 84 Vt. 274; *Smith v. Applegate*, 25 N. J. L. 352; *Frost v. Belmont*, 6 Allen, 152; *Hatzfeld v. Gulden*, 7 Watts, 152; *Martin v. Second & Third St. Pass. R. Co.* 3 Phila. 816; *Cunningham v. Cunningham*, 18 B. Mon. 19; *Wood v. McCann*, 6 Dana, 366; *Hunt v. Test*, 8 Ala. 718; *McBratney v. Chandler*, 22 Kan. 692; *Filson v. Himes*, 5 Pa. 452; *Cummings v. Saux*, 30 La. Ann. 207; *Frankfort v. Winterport*, 54 Me. 250; *Usher v. McBratney*, 8 Dill, 385; *Coquillard v. Bears*, 21 Ind. 479. As to presumption of illegality, see *Milbank v. Jones*, 88 N. Y. S. R. 910.

³*Burke v. Child (Trist v. Child)*, 88 U. S. 21 Wall. 441, 22 L. ed. 628; *Sweeney v. McLeod*, 18 Or. 830.

⁴*Hatzfeld v. Gulden*, 7 Watts, 152; *Clippinger v. Hepbaugh*, 3 Watts & S. 815.

⁵*Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 314, 14 L. ed. 953.

Contingent compensation for securing the passage of legislation is likely to induce an attempt to use improper means to accomplish success, and such contracts are looked upon with disfavor by the courts.¹

§ 20. **Contracts Influencing Elections or Appointments.**—All agreements which interfere with the integrity, discretion, or freedom of the electing or appointing power are illegal.²

Promises by candidates for offices, made with intention to swerve a voter from his duty to consider qualification for office only, and to trammel the free exercise of his right of suffrage, are subversive of the plainest dictates of public policy.³

The agreement of a candidate for public office that he will reimburse an association promoting his canvass, for its expenses for advertising, clerk hire, room rent, etc., is unlawful and void.⁴ So a contract to obtain, by private means, appointment to a public office is void.⁵

A promise to aid in the election of another cannot be made the foundation of an action.⁶

The sale of a person's influence to obtain office for another is void at common law.⁷

Contracts for the sale of public office are void;⁸ or to secure support in a candidature.⁹ So of a contract to give a subordinate

¹*Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 324, 14 L. ed. 957; *Wood v. McCann*, 6 Dana, 386; *Gil v. Williams*, 12 La. Ann. 219; *Bryan v. Reynolds*, 5 Wis. 200; *Fuller v. Dame*, 18 Pick. 472; *Weed v. Black*, 2 McArth. 268.

²*Hartwell v. Hartwell*, 4 Ves. Jr. 811; *Wallis v. Portland*, 8 Ves. Jr. 494; *Stevens v. Bagwell*, 15 Ves. Jr. 139; *Morris v. MacGullock*, 2 Eden, 190; *Hanington v. Du Chatel*, 1 Bro. Ch. 124; *Boynton v. Hubbard*, 7 Mass. 112, 119; *Ferris v. Adams*, 23 Vt. 186; *Hunter v. Nolf*, 71 Pa. 282; *Mequire v. Corwine*, 101 U. S. 108, 25 L. ed. 899; *Reed v. Peper Tobacco Warehouse Co.* 2 Mo. App. 82; *Guernsey v. Cook*, 120 Mass. 501. See *Phelan v. New York* 38 N. Y. S. R. 805.

³*Alford v. Collin*, 20 Pick. 428.

⁴*Foley v. Speir*, 1 Cent. Rep. 716, 100 N. Y. 552.

⁵*Mequire v. Corwine*, 101 U. S. 108, 25 L. ed. 899; *Wilson v. Himes*, 5 Pa. 452; *Lewis*, Crim. L. 123.

⁶*Martin v. Wade*, 87 Cal. 168; *Nichols v. Mudgett*, 32 Vt. 546; *O'Rear v. Kiger*, 10 Leigh, 622.

⁷*Mequire v. Corwine*, 101 U. S. 108, 25 L. ed. 899; *Martin v. Wade*, 87 Cal. 168; *Carlton v. Whitcher*, 5 N. H. 196; *Cardigan v. Page*, 6 N. H. 183; *Boynton v. Hubbard*, 7 Mass. 119; *Stroud v. Smith*, 4 Houst. (Del.) 448; *Gaston v. Drake*, 14 Nev. 175.

⁸*Outon v. Rodes*, 3 A. K. Marsh. 433.

⁹*Swayze v. Hull*, 8 N. J. L. 66.

office in consideration of receiving personal services from the appointee.¹

A agreed to pay B 2 per cent commission to procure a purchaser for the office of surveyor of baggage of the city of Q. Such an agreement is void.²

A purchased the office of constable from the town of W. and afterwards brought suit to recover the price paid. He was nonsuited.³

An agreement between candidates that each will pay to the other one half of the net proceeds of his office is against public policy and cannot be enforced.⁴

An agreement to abandon an election contest in consideration of a sum of money is void.⁵ So, an agreement between candidates that one shall withdraw in favor of the other is void.⁶

A corrupt agreement between two officers in whom were vested certain county nominations for the allotment of certain votes, is a conspiracy at common law.⁷

Any agreement to divide the emoluments of an office is void.⁸

A contract by which the salary of an office is assigned to other parties is void as against public policy.⁹

Where an outgoing city treasurer, a defaulter, and the candidate who, if elected, would be his successor in office (the malversations of the incumbent being known to such candidate at the time, and who, to screen his friend, the outgoing incumbent, from liability, consented to run for the office), entered into a contract wherein it was agreed that the defaulter incumbent should continue during the term of his successor to retain custody of the

¹ *Waldron v. Evans*, 1 Dak. 11.

² *Stackpole v. Earle*, 2 Wils. 188; *Greenhood*, Pub. Pol. 593.

³ *Groton v. Waldoborough*, 11 Me. 806. *Contra*, *Whittingham v. Burgoyne*, 3 Anstr. 900; *Morris v. McCulloch*, Ambl. 482.

⁴ *Glover v. Taylor*, 38 La. Ann. 684.

⁵ *Coppock v. Bower*, 4 Mees. & W. 861.

⁶ *Ham v. Smith*, 87 Pa. 68; *Hunter v. Nolf*, 71 Pa. 282; *Martin v. Wade*, 37 Cal. 168; *Gray v. Hook*, 4 N. Y. 449; *Benedict v. Ehler*, Lewis, Crim. L. 126.

⁷ *Com. v. Callaghan*, 2 Va. Cas. 460.

⁸ *Gaston v. Drake*, 14 Nev. 175.

⁹ *Ryall v. Rowles*, 2 Lead. Cas. Eq. *784, 1 Ves. Sr. 348; *Davis v. Marlborough*, 1 Swanst. 74; *Cooper v. Reilly*, 2 Sim. 560; *Palmer v. Bate*, 2 Brod. & B. 678; *Pollock*, Cont. 289; *Leake*, Cont. 727.

funds and generally perform all the duties of the office, his successor merely to sign the official reports and be treasurer merely in name, such contract is void as against public policy.¹

It has been held that there is no difference in principle between the sale of an office for a valuable consideration and the disposing of it to the person who will perform its duties for the lowest compensation.²

To permit a candidate, in order to influence the voters, to hold out a promise that he will serve, in case of election, for less than the fees or salary fixed by law, is to thwart the will of the Legislature, and to defeat the object of the law. It is unjust to honest aspirants who rely upon their merits for political preferment, and tends to degrade the public service by making the offices not the reward of official capacity and honorable conduct, but the prey of those who by reason of incapacity to earn a livelihood in the common pursuits of life are willing to undertake the duties of public service for a less sum than the Legislature has deemed an adequate compensation for the work. It puts up the offices of the State to the lowest bidder and conduces to influence the voters to lose sight of the personal fitness of the respective candidates and to be governed by considerations of a false economy.³

It may be that an offer by a candidate for county clerk to remit, in case of his election, his fees for *ex officio* services, should be deemed an offer to contribute to each taxpayer his proportion of the taxes necessary to raise the sum so remitted.

In *Carrothers v. Russell*, 53 Iowa, 346, 36 Am. Rep. 222, the Supreme Court of Iowa held such a promise virtually an offer to bribe the voters. But it does not follow that, in the absence of some constitutional or statutory provision, a candidate who has made such promise and has received the highest number of votes and has taken the required oath can be removed from office by the mere proof of the fact in the proceeding in which he is sought to be ousted.

The case of *Com. v. Jones*, 10 Bush, 725, is an authority bear-

¹*Cobbs v. Hixson*, 4 L. R. A. 682, 75 Mich. 260.

²*Bacon, Abr. Offices*, F; *Stockwith v. North*, F. Moore, 781; *Blackford v. Preston*, 8 T. R. 89; 1 Hawk. P. C. chap. 67, § 3; *State v. Dustin*, 5 Or. 875.

³*State v. Humphrey*, 5 L. R. A. 217, 74 Tex. 466.

ing upon the question. The Constitution of Kentucky requires every person before accepting office to take an oath that he has not fought a duel or sent or accepted a challenge to fight a duel. That Constitution also contained the further provision which declared that anyone who had fought a duel or sent or accepted a challenge should be disqualified from holding office. In the case cited it was held that a party who had been elected to an office and had qualified by taking the prescribed oath could not be deprived of his office until he had been legally convicted of the offense of having sent a challenge, in a proper criminal proceeding, upon an indictment charging him with that offense.

In *Greenhood on Public Policy* (p. 341) it is said: "So far has the doctrine, which prohibits anything which might influence the selection of public officers from other considerations than that of personal merit, been carried, that an election secured by a promise on the part of a candidate to perform the duties of the office to which he aspires, if elected, for less than the legal fees or salary, is void." The same doctrine is recognized in *McCrary on Elections* (3d ed.) § 181. If the authors mean to assert that an election so procured is void, without reference to the question whether or not a sufficient number of voters were induced by the promise, to vote for the successful candidate, to have changed the result, they are not supported by the authorities which they cite.

In *Carrothers v. Russell*, 53 Iowa, 346, the Iowa court held that a promise by a candidate to pay into the treasury, if elected, all the fees of his office in excess of \$1,000, rendered him ineligible; but the decision is expressly based upon the provisions of a statute of that State.

In *State v. Purdy*, 36 Wis. 213, 17 Am. Rep. 485, it was decided, merely, that the votes which were procured by a similar promise should be rejected. To the same effect was *State v. Olin*, 23 Wis. 327.

In *State v. Collier*, 72 Mo. 13, 37 Am. Rep. 417, the information charged that a like promise had been made and that a sufficient number of votes had been influenced thereby to change the result. The court held that a demurrer to the information was improperly sustained; but it did not hold either that the election was void or that the candidate was disqualified.

In *Tucker v. Aiken*, 7 N. H. 113, the selectmen of a town had put up the office of collector of taxes to the lowest bidder, and his right to the office was collaterally brought into question in the suit. It was held that the question could not be determined in a collateral proceeding.

In *Hall v. Gavitt*, 18 Ind. 390, it was decided that the sale by a sheriff of the office of deputy was void; and that a bond given as a part of the bargain by the deputy to the sheriff for the faithful performance of his duties was also void.

There are some other cases which might be cited, but these approach most nearly the question; and it is clear that none of them hold that an election procured by such a promise is void, or that, in the absence of a written law so declaring, the incumbent so elected can be ousted for that reason alone.

It has however been held that proof that a candidate for the nomination of county commissioner in Pennsylvania violated the statute of that State, enacted to prevent fraud at nominating elections, is, under the Constitution disqualifying such person from holding office, sufficient, after his election, to oust him from the office.¹

Where it was proved that a candidate for Parliament promised money to voters to induce them to vote, the indictment, though bad for uncertainty, was cured by the verdict of guilty.²

§ 21. Contracts Obstructing Public Justice—Maintenance and Champerty.—Any agreement which looks to the concealment of immoral or vicious or criminal conduct, is opposed to public policy and void.³

In general it is to the interest of the public that the discontinuance of a prosecution, for an offense which seriously affected the public, whether a felony or a misdemeanor, should not be made matter of private bargain; and hence the suppression or settlement of such prosecution, except in cases of slight assault, is contrary to public policy and therefore void, unless such settlement is in a

¹*Leonard v. Com.* 112 Pa. 607.

²*Reg. v. Stroulger*, L. R. 17 Q. B. Div. 327.

³*Brown v. Brine*, L. R. 1 Exch. Div. 5; *Windhill Local Board of Health v. Vint*, L. R. 45 Ch. Div. 351; *Barrett v. Weber*, 125 N. Y. 18.

case where the law provides such an arrangement, or where the injured party may find an adequate remedy in a civil suit.¹

If any part of the consideration of a contract or a note or mortgage is the stifling or discontinuance of a criminal prosecution for any offense against the public—the compounding of an offense—the whole contract is void. There is no offense, touching the public as such, whose prosecution can be made a matter of private arrangement.²

So a contract to obstruct justice, however the purpose may be concealed, is void.³

An agreement to deprive the courts of jurisdiction is void.⁴ But parties may so bind themselves and prescribe the instruments of evidence as to prevent the court from looking beyond their agreement.⁵

An attorney cannot recover for his services under an employ-

¹*Collins v. Blautern*, 2 Wils. 341, 1 Smith, Lead. Cas. (8th Am. ed.) 715, 718; *Geier v. Shads*, 109 Pa. 180; *Fisher v. Apollinaris Co.* L. R. 10 Ch. 297; *Fay v. Oatley*, 6 Wis. 42, 59; *Price v. Summers*, 5 N. J. L. 578; *Greenfield Bank v. Crafts*, 4 Allen, 447; *Union Bank v. Middlebrook*, 38 Conn. 95; *Casco Bank v. Keene*, 58 Me. 103. But see *Vincent v. Groom*, 1 Yerg. 430; *Unkman v. Wright*, 39 Ohio St. 405; *Jones v. Rice*, 18 Pick. 440; *Corley v. Williams*, 1 Ball. L. 588; *Lindsay v. Smith*, 78 N. C. 328; *Bowen v. Buck*, 28 Vt. 306; *Gray v. Seigler*, 2 Strobb. L. 117; *Shisler v. Vandike*, 92 Pa. 447; *Brook v. Hook*, L. R. 6 Exch. 89.

²*Ackerbeck v. Hall*, 14 Bush, 505; *Rhodes v. Neal*, 64 Ga. 704; *Pearce v. Wilson*, 2 Cent. Rep. 57, 111 Pa. 14; *Riddle v. Hall*, 99 Pa. 116; *Ormerod v. Dearman*, 100 Pa. 561; *Whitmore v. Farley*, 45 L. T. N. S. 99; *Foley v. Greene*, 1 New Eng. Rep. 17, 14 R. I. 618; *Dartmouth v. Bennett*, 15 Barb. 541; *Wiener v. Bardwell*, 88 Mich. 278; *Kimbrough v. Lane*, 11 Bush, 556; *Gardner v. Mozey*, 9 B. Mon. 90; *Bierbauer v. Wirth*, 10 Blas. 60; *Pearce v. Wilson*, 2 Cent. Rep. 57, 111 Pa. 14; *Sumner v. Summers*, 54 Mo. 840; *Osbaldiston v. Simpson*, 18 Sim. 518; *Bredin's App.* 93 Pa. 241; *Wheaton v. Anley*, 71 Ga. 35; *Ham v. Smith*, 87 Pa. 63; *Guilford County Comrs. v. March*, 89 N. C. 268; *Young v. Robertson*, 6 Phila. 184; *Burkholder v. Beeton*, 65 Pa. 496; *Shisler v. Vandike*, 92 Pa. 447; *Workman v. Wright*, 44 Ohio St. 405; *McHugh v. Schuylkill County*, 67 Pa. 391; *Brook v. Hook*, L. R. 6 Exch. 89; *Haines v. Lewis*, 54 Iowa, 301.

³*Dawkins v. Gill*, 10 Ala. 206; *Banks v. May*, 8 A. K. Marsh. 435; *Hawkeye Ins. Co. v. Brainard*, 12 Iowa, 180; *Touro v. Caesin*, 1 Nott & McC. 174; *State v. McKinstry*, 50 Ind. 465; *Patterson v. Donner*, 48 Cal. 269; *Roll v. Raguet*, 4 Ohio, 400; *Skoutenburg v. Lybrand*, 18 Ohio St. 236; *Baker v. Furris*, 61 Mo. 389; *Southern Exp. Co. v. Duffey*, 48 Ga. 858; *Ormerod v. Dearman*, 100 Pa. 561; *Ricketts v. Harvey*, 78 Ind. 152; *Herman v. Jeuchner*, L. R. 15 Q. B. Div. 561; *Cambioso v. Maffett*, 2 Wash. C. C. 96; *Barron v. Tucker*, 53 Vt. 338; *Grove v. McCalla*, 21 Pa. 44; *State v. Noyes*, 25 Vt. 415; *Dixon v. Otmstead*, 9 Vt. 310; *Merrill v. Carr*, 16 N. H. 114; *Thomas v. Caulkett*, 57 Mich. 393.

⁴*Wough v. Schlenk*, 23 Ill. App. 433.

⁵*Crumlish v. Wilmington & W. R. Co.* 5 Del. Ch. 270.

ment to obstruct the course of justice by procuring the release from jail of a witness, in order to get him out of the way.¹

A contract made by a justice of the peace with a litigant in his court, that such litigant should not be required to pay any fees or costs therein unless procured from the adverse party, is contrary to public policy and void.²

A contract to pay for the postponement of the execution of a search, warrant is void.³

Although a witness is beyond the process of the court, yet his attendance cannot be induced by a promise to pay a compensation dependent in amount upon the success of the party promising in his suit.⁴

Nor will a promise to a witness, if he avoids an appearance to testify, be enforced.⁵

An agreement to give bail or to secure one doing this, to enable a prisoner to escape is void.⁶ Payment for signing a petition for pardon cannot be enforced on a promise to make compensation.⁷

A defendant in a partition suit must make known to the court and to his co-defendants any fact within his knowledge which will prevent a confirmation of the sale; hence an agreement by him, with knowledge that the property was sold for less than its real value, to refrain from objecting to the confirmation of the sale in consideration of the payment to him of an additional sum for his interest in the property, is a fraud upon the court and his co-defendants, is against public policy, and will not be enforced in favor of either party thereto.

It was a promise to pay a consideration for the concealment of a fact from the court and the parties, material to the rights of said parties, and which it was his duty to make known. Such a con-

¹*Crisup v. Groselight*, 79 Mich. 380.

²*Hawkeye Ins. Co. v. Brainard*, 72 Iowa, 130.

³*Merrill v. Carr*, 60 N. H. 114.

⁴*Dawkins v. Gill*, 10 Ala. 206.

⁵*Bierbauer v. Wirth*, 10 Biss. 60.

⁶*Beahr v. Wolf*, 59 Ill. 470; *Dunkin v. Hodge*, 46 Ala. 523.

⁷*Buck v. First Nat. Bank of Paw Paw*, 27 Mich. 298. See *Haines v. Lewis*, 54 Iowa, 301; *Guilford County Comrs. v. March*, 89 N. C. 268.

tract was against public policy and neither party should receive the aid of the courts to enforce it.¹

Champerty is a species of maintenance, which at common law was an indictable offense. Maintenance was an officious intermeddling in a lawsuit by a mere stranger without profit.² Champerty involved the element of compensation for such unlawful interference by bargain for part of the matter in suit, or some profit growing out of it, or, according to some of the authors, as well also for the whole of the thing in dispute.³

It would accomplish no good to quote at length the numberless definitions of these offenses given in the old books. "It appeareth that the end of champerty and maintenance is to suppress justice and truth, or at least to work delay, and therefore it is *malum in se* and against the common law."⁴ It existed before the Statutes of West 1, chap. 25.⁵

Sir James Stephen, in his Digest of Criminal Law (note 8), alludes to the vagueness with which these crimes are defined by the ancient common law writers, and discusses the reasons why they have long since become obsolete.

The ground of their origin is found in the familiar principle stated by Lord Coke: "Nothing," he says, "in action, entry or re-entry, can be granted over; for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed."⁶

It was a part of the law of maintenance that no chose in action, which included all rights not reduced to possession, could be assigned or transferred. This was on the ground, as said by Mr.

¹ *Tappan v. Albany Brew. Co.* 5 L. R. A. 438, 80 Cal. 570; *Beard v. Beard*, 65 Cal. 356.

² Bl. Com. 135; *Andrews v. Thayer*, 30 Wis. 228; 2 Bouv. Law Dict. (14th ed.) 90; Burrill, Law Dict.; *Scobey v. Ross*, 13 Ind. 117; *Brown v. Beauchamp*, 5 T. B. Mon. 413; *Rust v. Larue*, 4 Litt. 411; *Douglass v. Wood*, 1 Swan, 393; *Pechell v. Watson*, 8 Mees. & W. 691, 425.

³ Hawk. P. C. 462, 468; *Holloway v. Lowe*, 7 Port. (Ala.) 488; *Poe v. Davis*, 29 Ala. 688; *Ware v. Russell*, 70 Ala. 174; *Stanley v. Jones*, 7 Bing. 369; *Box v. Barnaby*, Hob. 117; *Sedgwick v. Stanton*, 14 N. Y. 289; *Bell v. Smith*, 7 Dowl. & R. 846.

⁴ Inst. 208; 1 Hawk. P. C. 283, § 86, p. 543.

⁵ 3 Edw. I.; 28 Edw. I, chap. 11; 33 Edw. I.; 32 Hen. VIII., chap. 9; *Wallis v. Portland*, 3 Ves. Jr. 494; *Stanley v. Jones*, 7 Bing. 369; 4 Bl. Com. 135; *Backus v. Byron*, 4 Mich. 535; *Sweet v. Poor*, 11 Mass. 554.

⁶ Co. Litt. 114a.

Chitty, that "such alienations tended to increase maintenance and litigation, and afforded means to powerful men to purchase rights of action, and thereby enable them to oppress indigent debtors, whose original creditors would not, perhaps, have sued them."¹

It is common knowledge, however, that this rule, refusing to sanction or give effect to the assignment of choses in action, was never adopted by courts of equity, either in England or in this country, and that courts of law, yielding to the growing exactions of commerce, finally allowed the assignees of such rights to maintain suits in the name of their assignors.²

The peculiar state of society out of which such a law grew carried it to the most absurd extremes. Men were held indictable for aiding a litigant to find a lawyer; for giving friendly advice to a neighbor as to his legal rights; for lending money to a friend to vindicate his known legal rights; for offering voluntarily to testify in a pending suit; and other like offices of charity and friendship.³

It is not surprising, therefore, that the law on this subject has gradually undergone a great change, which is recognized universally by jurists, judges and law writers everywhere; though in some of the states the change is scarcely recognized as it should be by the courts, in others this modification is acknowledged.⁴ It has been greatly modified in Massachusetts and New York, even beyond the active aid of legislation.⁵ After adverse possession of leased property has ripened into a title by the expiration of twenty years after termination of the tenancy, a subsequent conveyance

¹ Chitty, Bills, *6, 7.

² 2 Story, Eq. Jur. § 1050.

³ 1 Hawk. P. C. Curw. ed. 455, 456, §§ 5-11; 3 Am. & Eng. Enc. L. 71.

⁴ *Graham v. Graham*, 10 W. Va. 355; *Gowen v. Nowell*, 1 Me. 292; *Pratt v. Pierce*, 36 Me. 448; *Atchison, T. & S. F. R. Co. v. Johnson*, 29 Kan. 218; *Dahms v. Sears*, 18 Or. 47; *Boardman v. Thompson*, 25 Iowa, 488; *Holloway v. Lowe*, 7 Port. 488; *Byrd v. Odem*, 9 Ala. 755; *Coquillard v. Bears*, 21 Ind. 479; *Scobey v. Ross*, 18 Ind. 117; *Brown v. Beauchamp*, 5 T. B. Mon. 418; *Bryant v. Hill*, 9 Dana, 67; *Cardwell v. Sprigg*, 7 Dana, 86; *Wilhite v. Roberts*, 4 Dana, 172; *Evans v. Bell*, 6 Dana, 479; *Thurston v. Percival*, 1 Pick. 415; *McMahan v. Bows*, 114 Mass. 140; *Arden v. Paterson*, 5 Johns. Ch. 44, 1 L. ed. 1002; *Thalimer v. Brinkerhoff*, 20 Johns. 386; *Slade v. Rhodes*, 2 Dev. & B. Eq. 24; *Weedon v. Wallace*, Meigs. 286; *Dorwin v. Smith*, 35 Vt. 69; *Martin v. Clarke*, 8 R. I. 389; *Nichols v. Bunting*, 8 Hawks, 86; *Martin v. Veeder*, 20 Wis. 466; *Martin v. Amos*, 18 Ired. L. 201.

⁵ *Blaisdell v. Ahern*, 4 New Eng. Rep. 347, 144 Mass. 393; *Small v. Mott*, 22 Wend. 405.

by the landlord is void for champerty.¹ In other states it has been entirely repudiated.²

This change has been called for by the new conditions of modern society, considered in its varied relations, commercial, political and sociological. In many of its phases it has been, both in America and England, emphatically discarded as "inapplicable to the present condition of society, and obsolete."³

It is accordingly asserted on high English authority that no one has been punished criminally for the offense of maintenance or champerty within the memory of living man.⁴

Public opinion in England has advanced so far on this subject that the criminal law commissioners many years ago recommended very earnestly that the offenses of maintenance and champerty be abolished, observing of them that they "are relics of an age when courts of justice were liable to intimidation by the rich and powerful and their dependents."⁵

There is much reason, it thus seems, for the relaxation of the old doctrines pertaining to this subject, so that they may be adapted to the new order of things in the present highly progressive and commercial age. Necessity and justice have, accordingly, forced the establishment of recognized exceptions to the doctrine of these offenses. Among these may be enumerated the following instances: relationship by blood or marriage will often now justify parties in giving each other assistance in lawsuits;⁶ and the relation of attorney and client; or the extension of charitable aid to the poor and oppressed litigant;⁷ and especially is an interference in a lawsuit excusable when it is by one who has, or honestly believes he has, a valuable interest in its prosecution.

¹*Church v. Schoonmaker*, 115 N. Y. 570; *Church v. Becker*, 115 N. Y. 562,

²*Mathewson v. Fitch*, 23 Cal. 86; *Danforth v. Streeter*, 28 Vt. 490; *Richardson v. Rowland*, 40 Conn. 565; *Lytle v. State*, 17 Ark. 606; *Schomp v. Schenck*, 40 N. J. L. 196; *Hall v. Ashby*, 9 Ohio, 96; *Bentinck v. Franklin & G. O. Co.* 38 Tex. 458; *Ballard v. Carr*, 48 Cal. 74; *Webb v. Comp.*, 26 Ga. 354.

³*Sedgwick v. Stanton*, 14 N. Y. 289, 296; *Masters v. Müller*, 4 T. R. 320; *Thalhimer v. Brinckerhoff*, 8 Cow. 628; *Richardson v. Rowland*, 40 Conn. 565; 2 Whart. Crim. L. (8th ed.) § 1854, note.

⁴Stephen, Crim. L. 284.

⁵Stephen, Crim. L. note 8.

⁶But see *Barnes v. Strong*, 54 N. C. 100; *Burke v. Greene*, 2 Ball & B. 521.

⁷*Wright v. Cuin*, 93 N. C. 296.

The principle is thus generally stated: "It has been seen that the gist of the offense of maintenance is that the interference is officious. Where, therefore, a party either has, or honestly believes he has, an interest, either in the subject matter of the litigation or in the question to be determined, he may assist in the prosecution or defense of the suit, either by furnishing counsel or contributing to the expenses, and may, in order to strengthen his position, purchase the interest of another party in addition to his own. The interest may be either small or great, certain or uncertain, vested or contingent; but it is essential that it be distinct from what he may acquire from the party maintained."

The purchase of railroad bonds from foreclosing bondholders, pending a suit involving the sale of the railroad, in pursuance of a purpose to obtain a lease of the road to the purchaser and his associates, who desired it to form a connection with a road already owned by them; and an agreement by the purchaser to pay all expenses of the pending litigation, although the bonds were not to be delivered until its termination,—are not void for champerty because of the purchaser's interest in the result of the suit.*

A sale of his claim by one who performs labor and furnishes materials for the construction of a gravel road is not champertous.†

In *Thompson v. Marshall*, 36 Ala. 504, this principle was applied to a case where one co-defendant, in a suit pending to rescind a conveyance for fraud, purchased the interest of such co-defendant in the property in litigation, and assumed a liability for his vendor's share of the costs and expenses of suit. The contract of purchase was held not to be champertous, because the interference was to protect a valuable interest, and was not, therefore, either an unlawful or officious intermeddling.

So in *McCall v. Copehart*, 20 Ala. 521, where certain persons, erroneously believing that they had an interest in a piece of land then in litigation, purchased the interest of the defendant, and indemnified him against the cost and damages of suit, the court held the transaction free from the taint of champerty, on the ground that the assistance was rendered by the defendants "under

*3 Am. & Eng. Enc. L. 76.

†*Gilman v. Jones*, 4 L. R. A. 118, 87 Ala. 691.

**Hart v. State*, 120 Ind. 83.

the honest belief that they were interested in the result of the suit, and not for the purpose of fomenting litigation."

The modern and better definitions of "champerty" incorporate this idea fully. Mr. Wharton says: "Maintenance is support given to a litigant in any legal proceeding in which the person giving the assistance has no valuable interest, or in which he assists from any improper motive."¹

In 2 Bouvier's Law Dictionary (14th ed.) 90, it is defined to be "a malicious, or, at least, officious, interference in a suit in which the offender has no interest, to assist one of the parties to it against the other with money or advice to prosecute or defend the action without any authority of law."

So Mr. Addison involves in the definition the idea of agreeing to assist in the prosecution of a lawsuit, "in which the party making the agreement is in no wise interested, and with which he has no just or reasonable ground for interference."²

Of course it is necessarily true that, if the offense in question does not amount to maintenance, there can be no champerty in it, because champerty is but a species of maintenance.³

In *Thallhimer v. Brinckerhoff*, 3 Cow. 623, a leading and learned case on the subject of champerty, it is said "that any interest whatever in the subject of the suit is sufficient to exempt him who gives aid to the suitor from the charge of illegal maintenance." And referring to such interferences it is said: "Upon all such cases these laws were never intended to operate. They were intended to prevent the interference of strangers having no pretense of right to the subject of the suit, and standing in no relation of duty to the suitor. They were intended to prevent traffic in doubtful claims, and to operate upon buyers of pretended rights, who had no relation to the suitor or the subject, otherwise than as purchasers of the profits of litigation."

An agreement giving counsel an amount equal to a part, or a part of, the property to be recovered, as a contingent fee for his services in litigation, was held valid.⁴

¹2 Whart. Crim. L. (8th ed.) § 1854.

¹1 Add. Cont. § 256.

²2 Co. Inst. 207.

⁴*Ballard v. Carr*, 48 Cal. 74; *Ramsey v. Trent*, 10 B. Mon. 841; *Perry v. Dicken*, 105 Pa. 83; *Jewell v. Neidy*, 61 Iowa, 299; *Whithead v. Ducker*,

So it is recognized in the Supreme Court of the United States, that attorneys may lawfully contract with their clients to prosecute claims against the United States and receive compensation therefor conditioned upon their success, either as fees or agreed percentages upon the amount recovered.¹ In any case when litigation ends the party rendering service may contract for payment out of the property recovered.²

In *Ware v. Russell*, 70 Ala. 174, the court sustained an agreement between attorney and client as free from champerty or maintenance, where the defendant in attachment, in consideration of professional services on the part of the assignee, assigned to his attorney the entire property in litigation, giving him the entire management and control of the suit, and stipulating for his own (the assignor's) active prosecution of it. It was said by Brickell, *Ch. J.*:

"The corrupting element of the contract [of champerty] is its tendency to foment or protract litigation, its dependency for its value upon the termination of suits, and its introduction, to control and manage them, of parties without other right or interest than such as is derived from the contract." On this ground the sale of land *pendente lite*, or by one out of possession is forbidden.³ But that litigation may be in certain possible circumstances required to perfect the title will not make the deed void.⁴ As between the parties such conveyances are generally held as estoppels.⁵

11 *Smedes & M.* 98; *Gilchrist v. Brande*, 58 Wis. 184; *Dickerson v. Pyle*, 4 Phila. 259; *Quint v. Ophir Silver Min. Co.* 4 Nev. 305; *Coughlin v. New York Cent. & H. R. R. Co.* 71 N. Y. 443; *Marsh v. Holbrook*, 3 Abb. App. Dec. 176; *Hoffman v. Vallejo*, 45 Cal. 564.

¹ *Manning v. Sprague*, 1 L. R. A. 516, 148 Mass. 18; *Re Paschal*, 77 U. S. 10 Wall. 483, 19 L. ed. 992; *McPherson v. Cox*, 96 U. S. 404, 417, 24 L. ed. 746, 750; *Central R. & Bkg. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915.

² *Hickey v. Baird*, 9 Mich. 32; *Floyd v. Goodwin*, 8 Yerg. 484; *Walker v. Cuthbert*, 10 Ala. 218; *Ross v. Chicago, R. I. & P. R. Co.* 55 Iowa, 691.

³ *Sweet v. Poor*, 11 Mass. 553; *German Mut. Ins. Co. v. Grim*, 33 Ind. 249; *Stotsenburg v. Marks*, 79 Ind. 197; *Justice v. Eddings*, 75 N. C. 581; *Lane v. Shears*, 1 Wend. 433; *West v. Raymond*, 21 Ind. 305.

⁴ *Kellar v. Blanchard*, 21 La. Ann. 38. And see generally on the subject, *Rouse v. Beckett*, 30 Ind. 154; *Jackson v. Andrews*, 7 Wend. 152; *Simpson v. Montgomery*, 25 Ark. 365; *Verdier v. Simons*, 2 McCord, Eq. 335; *Batterton v. Chiles*, 12 B. Mon. 848.

⁵ *Steeple v. Downing*, 60 Ind. 478; *McMahan v. Bowe*, 114 Mass. 140; *University of Vermont v. Joslyn*, 21 Vt. 52; *Livingston v. Proseus*, 2 Hill, 526.

In *Call v. Calef*, 13 Met. 362, where two persons owned distinct rights to the exclusive use of a patent in two different places, near each other, it was held that the interest which each had in maintaining the value and profit of his particular right would justify him in aiding the other to prosecute a suit for the infringement of the exclusive right of the latter. So it has been held, and is manifest, that any citizen may lawfully contribute to the lawful expenses of any public criminal prosecution, and the act will not subject him to the charge of maintenance.¹

It may safely be said that the whole doctrine of maintenance has been modified in recent times so as to confine it to strangers who, having no valuable interest in a suit, pragmatically interfere in it for the improper purpose of stirring up litigation and strife, and champerty, which is a species of maintenance attended with a bargain for a part or the whole of the thing in dispute, does not exist in the absence of this characteristic of maintenance. If the pecuniary interest of a person, even though he own no part of the immediate subject matter of the suit, be so connected with it collaterally in any way as to be diminished or increased in value by the result of such suit, there is no principle of public policy that ought to forbid such person from taking proper care that such interest shall be properly protected in the courts.

The forfeiture of a charter of a railroad, for example, on the line of which the owner of a factory or rolling mill may have his plant, might result in his financial ruin. Could it be said, in the light of modern views on this subject, that an agreement to aid in preventing the forfeiture would be champertous, and as such criminal, because the mill owner held no stock in the railroad company, nor was otherwise immediately interested in the corporate charter or property? Interference in lawsuits, it has been said, to savor of maintenance, must have some "tendency to pervert the course of justice;"² or else, as said by Blackstone, "to pervert the remedial process of the law into an engine of oppression."³

¹ *Com. v. Dupuy*, Brightly, 44. See also Story, Cont. § 579; 2 Parsons, Cont. *765, 766; 2 Story, Eq. Jur. § 1050.

² *Stanley v. Jones*, 7 Bing. 369.

³ 4 Bl. Com. 185.

These elements of unlawfulness are entirely wanting in the supposed case.

Mr. Story asserts that one "may purchase by assignment the whole interest of another in a contract or security or other property which is in litigation, provided there be nothing in the contract which savors of maintenance; that is, provided he does not undertake to pay any costs, or make any advances beyond the mere support of the exclusive interest which he has so acquired." And he puts his conclusion upon the ground that a court of equity would, without special contract, compel the assignor to permit his name to be used in the suit, on the assignee's giving him indemnity for such costs. "Such indemnity and such proceedings, under such circumstances," he adds, "are not deemed maintenance."¹

This seems to be the more correct and logical view, and better comports with the necessities of modern commerce, except as to transactions between client and attorney, which, by reason of their peculiar relation, ought perhaps to stand on a different basis from other contracts savoring of a champertous character;² although by the great weight of modern authority contingent fees of a legitimate character, charged for professional services, dependent on the amount of recovery, are not deemed within the rules against champerty and maintenance.³ Such employments are not looked upon with approval in England.⁴

Sustaining the views above expressed it was held in *Gilman v. Jones*, 4 L. R. A. 113, 87 Ala. 691, that the purchase of railroad bonds from litigant bond holders pending a suit involving the fate of the railroad, in pursuance of a plan to obtain a lease of the road to the purchaser and his associates, who need it to form

¹2 Story, Eq. Jur. 1050.

²*Gilman v. Jones*, 4 L. R. A. 113, 87 Ala. 691; *Thalhimer v. Drinckerhoff*, 3 Cow. 638, 15 Am. Dec. 281, note, and cases cited; *Stanton v. Embrey*, 93 U. S. 543, 28 L. ed. 968; *Blaisdell v. Ahern*, 4 New Eng. Rep. 347, 144 Mass. 398; *Walker v. Outhbert*, 10 Ala. 218, 219; *Kusterer v. Beaver Dam*, 56 Wis. 471; *Dickenson v. Devlin*, 14 Jones & S. 232; *Taylor v. Gilman*, 58 N. H. 417; *Bent v. Priest*, 10 Mo. App. 543; *Cross v. Bloomer*, 6 Baxt. 74; *McDonald v. Chicago & N. W. R. Co.* 29 Iowa, 171; *Chester County v. Barber*, 97 Pa. 455; *Hickey v. Baird*, 9 Mich. 32; *Walker v. Bietry*, 24 La. Ann. 349; *Stansell v. Lindsay*, 50 Ga. 360.

³*Ware v. Russell*, 70 Ala. 174; *Elliott v. McClelland*, 17 Ala. 206.

⁴*Reynell v. Sprys*, 8 Hare, 222; *Stanley v. Jones*, 7 Bing. 369; *Morgan v. Taylor*, 5 C. B. N. S. 653.

a connection with a road already owned by them, and an agreement by the purchaser to pay all expenses of the pending litigation, although the bonds were not delivered until its termination, are not void for champerty because of the purchaser's interest in the result of the suit.

§ 22. Contracts to Influence the Action of Corporations.—

A contract to restrict or to defeat a public enterprise is not enforceable,¹ and all agreements which interfere with the integrity, discretion or freedom of an appointment to private offices in corporations are illegal.²

Another class of cases is those in which some officer, or other person supposed to be in relation with a railroad company, undertakes for a consideration moving to it, to secure the location of stations, depots, etc., at a particular place. A conspicuous case in this class is *Fuller v. Dame*, 18 Pick. 472. All such contracts are void as against public policy.³

Where a railroad extension company is employed by a railroad company to build its line, and a contract is entered into between the extension company and a third party, to select a long and expensive route, thus imposing an unnecessary and heavy burden upon the railroad company, the contract is void, as immoral in its conception and corrupting in its tendency. That the individual contracting with the extension company is a director and stockholder in the railroad company, only adds to the infamy of the agreement.⁴

All arrangements by which directors or stockholders or other persons may acquire gain by inducing corporations to disregard their duties to the public, are illegal and lead to unfair dealing, and being against public policy will not be enforced by the courts.⁵

¹*Slocum v. Wooley*, 9 Cent. Rep. 659, 48 N. J. Eq. 451.

²*Guernsey v. Cook*, 120 Mass. 501; *Boynton v. Hubbard*, 7 Mass. 112, 119; *Reed v. Peper Tobacco Warehouse Co.* 2 Mo. App. 82; *Ferris v. Adams*, 23 Vt. 136; *Hunter v. Nolf*, 71 Pa. 282; *Meguire v. Corwine*, 101 U. S. 106, 25 L. ed. 899; *Hartwell v. Hartwell*, 4 Ves. Jr. 811; *Wallis v. Portland*, 3 Ves. Jr. 494; *Stevens v. Bagwell*, 15 Ves. Jr. 189; *Morris v. MacCulloch*, 2 Eden, 190; *Hannington v. DuChatel*, 1 Bro. Ch. 124.

³*Bestor v. Wathen*, 60 Ill. 188; *Linder v. Carpenter*, 62 Ill. 309.

⁴*Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 648, 32 L. ed. 819.

The case of *Fuller v. Dame*, 18 Pick. 472, is instructive on this head. It there appeared that Dame, the defendant, was the owner of a large tract of land and flats situated on Sea Street, and between it and Front Street, on the south side of Boston, which would be greatly enhanced in value if the Boston and Worcester Railroad Company would locate one of its depots between those streets and easterly of Front Street. To induce the company to make such location it was supposed to be necessary to form an association, which would pay to it a large sum of money and furnish a large tract of land for the depot, besides making other donations; and to provide the money and land, also to form a company to purchase the flats and land between the streets named, to be held as joint stock and laid out in due form and shape for sale. Fuller agreed to aid Dame in getting up such company, and in inducing the railroad company to fix its termination and principal depot between those streets, Fuller being himself of opinion that the railroad ought, from a view of the public good and the good of its stockholders, to enter the city on the southerly side and have its principal depot there. In consideration of such agreement Dame gave his note for \$9,600, payable to Fuller in three years, the note being deposited with third parties, to be delivered to him when the principal depot of the railroad company for merchandise was constructed between the streets mentioned. Fuller was at the time of the agreement a stockholder in the railroad company. The road having been completed, and the principal depot located between the streets mentioned, and the note not being paid, suit was brought upon it. It was adjudged that the contract was contrary to public policy, and that the note given in consideration of it was therefore void.

In coming to this conclusion the court considered somewhat at large the ground upon which contracts of this character were avoided, and held that it was because they tended to place one under wrong influences, by offering him a temptation to do that which might injuriously affect the rights and interests of third persons, and that the case before it was within the operation of this principle, the contract tending injuriously to affect the public interest in establishing the fittest and most suitable location for the termination of the Boston and Worcester Railroad for the

accommodation of the public travel. It is true the road was constructed and located by the corporation at the expense of private parties under the sanction of the Legislature, incorporated for that purpose, who were to be remunerated by a toll levied and regulated by law; and it was left to its directors to fix the termination and place of deposit. But in doing this a confidence was reposed in them, acting as agents for the public, a confidence which, it might seem, could have been safely so reposed, when it is considered that the interests of the corporation as a company of passenger and freight carriers for profit was identical with the interests of those who were to be carried and had goods to be carried, that is, with the public interest. This confidence, however, could only safely be so reposed under the belief that all the directors and members of the company should exercise their best and their unbiased judgment upon the question of such fitness, without being influenced by distinct and extraneous interests, having no connection with the accommodation of the public or the interests of the company. Any attempt, therefore, to create and bring into efficient operation such undue influence has all the injurious effects of a fraud upon the public, by causing a question which ought to be decided with a sole and single regard to public interests, to be affected and controlled by considerations having no regard to such interests.

In accordance with this view it has been declared that an agreement between a railroad official and another to divide the profits on a contract to be secured by the latter, to furnish materials for a public improvement, the only service rendered by the former being to allow the latter lower freight rates than he demanded of others, is void as against public policy. Such a contract will not support an action to recover a share of the profits realized.¹

And under a statute which prohibits any agents or employé of a railroad company from becoming in any manner interested in furnishing materials or supplies to the company, a contract on the part of the stock agent of the company to furnish forage for stock transported over the road is void.²

¹ *Barkley v. Williams*, 26 Ill. App. 218.

² *Rue v. Missouri P. R. Co.* 74 Tex. 474.

It is no answer to say that, by the Act of Incorporation, the executive authority was vested in a board of directors, and Mr. Fuller was not a director. He was a member of the company and might be chosen a director. He was an elector of the directors, and they were directly responsible to the stockholders. The immediate act of location was with directors, but the efficient authority was with the members and stockholders of the corporation, who elect the directors. The election may depend upon the known views and opinions of candidates upon this very question of location. They had a right to his disinterested judgment and advice upon the question of location; and this could not be exercised whilst he held and relied on a promise for a large sum of money, the payment of which depended upon this decision of the question by the directors.

The case of *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 648, 32 L. ed. 819, is much stronger than the one thus decided by the Supreme Judicial Court of Massachusetts. There the contract was held invalid because made with a stockholder of the company, by which he promised, for a pecuniary consideration, to endeavor to procure the company to locate one of its depots at a particular place in the city. In the former case the contract was with an employé of the company, to induce it to disregard its obligations; and the principal person making that contract on the part of the employé was a director and stockholder of the company which was to be thus seriously affected.

The principle, which is so clearly and forcibly stated in *Fuller v. Dame*, has been applied in numerous instances by the highest courts of different states, to avoid contracts made to influence railroad companies in selecting their routes and locating their depots and stations, by donations of land and money to some of its directors or stockholders or agents. Thus in *Bestor v. Wathen*, 60 Ill. 138, it appeared that in 1849 the Legislature of Illinois incorporated a company to build a railroad from a point on the Mississippi River to Peoria, and that in 1852 the charter was amended so as to authorize the extension of the road from Peoria eastward to the state line. In 1855 the company made a contract with the firm of Cruger, Secor and Company, by which the latter undertook the construction and equipment of the road. In 1856,

whilst engaged upon this work, the members of the firm, together with Bestor, the president of the railroad company, Sweat, one of its directors, and Smith, its construction agent, entered into a contract with Wathen and Gibson, the defendants, by which the latter, being the owners of 160 acres of land, agreed, in consideration that the road then in process of construction should cross the Illinois Central Railroad where their land was situated, the land would be laid out into town lots and sold, and after proceeds amounting to \$4,800 had been received, which were to be retained by Wathen and Gibson, a conveyance of an undivided half of the residue should be made to the other parties. The only consideration for this agreement, aside from the location of the road, was that the other parties should assist and contribute to the building up of the town on the land. The road was constructed across the Illinois Central, and Wathen and Gibson laid out the land into lots and proceeded to sell the same, and the town of El Paso was built on the land and an adjoining tract. In 1863 the plaintiffs filed their bill against Wathen and Gibson for an account of the sales and a conveyance of the undivided half of the lots unsold. The court held the contract void as against public policy, and dismissed the suit, and the decree in this respect was affirmed by the Supreme Court of the State, that court observing that when the people through their Legislature grants to a company the right of eminent domain for the purpose of constructing a railroad it is upon the supposition that the road will bring certain benefits to the public, and that when subscriptions are made to its stock, the money is subscribed upon the understanding that the officers intrusted with the construction of the road will so locate its line and establish its depots as to bring the highest pecuniary profit to the stockholders, compatible with a proper regard for the public convenience; that these alone are the considerations which should control officers of the road; and so far as they permit their official action to be swayed by their private interests, they are guilty of a breach of trust towards the stockholders, and a breach of duty to the public at large; and it added: "A court of equity will not enforce a contract resting upon such official delinquency, or even tending to produce it. Such is the character of the contract in *Woodstock Iron Co. v. Richmond & D. Extension*

Co. 129 U. S. 643, 32 L. ed. 819. To enforce it would lend the sanction of the court to a class of contracts, the inevitable tendency of which is to make the officers of these powerful corporations pervert their trust to their private gain, at the price of injury at once to the stockholders and to the public. Rendered into plain English, the contract in *Woodstock Iron Co. v. Richmond & D. Extension Co.* was a bribe on the part of Wathen and Gibson to the president and other officers of the railway company, and to the contractors who were building the road, of an undivided half of one hundred and sixty acres of land, in consideration of which the road was to be constructed on a certain line and a depot built at a certain point. Now if this was the best line for crossing the Illinois Central considered with reference to the interest of the stockholders and of the public, then it was the duty of the officers of the company to establish it there; and if they intended so to do because it was the proper line, but professed to be hesitating between this and another line in order to secure to themselves the contract under consideration, as is somewhat indicated by the evidence, then they were practicing a species of fraud upon the defendants, and the use of a false pretext in order to acquire defendants' property without consideration. If, on the other hand, this line was not the best, but was adopted because of this contract, the case is still stronger against the complainants. If such was the fact they are asking the court to enforce the payment of a bribe, the promise of which induced them to sacrifice their official duty to their private gain. If, as a third contingency, the choice lay between this line and another equally good, but not better, and they were influenced by this contract to adopt this line, then, although neither the company nor the public has been injured, yet the defendants have made their official power an instrument of private emolument in a manner which no court of equity can sanction. In this particular case no wrong may have been done, and yet public policy plainly forbids the sanction of such contracts, because of the great temptation they would offer to official faithlessness and corruption."

The doctrine of this case was approved by the Supreme Court of Illinois in *Linder v. Carpenter*, 62 Ill. 309; and in *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592.

Holladay v. Patterson, decided by the Supreme Court of Oregon (5 Or. 177), is also in harmony with *Fuller v. Dame* and *Bestor v. Wathen*, the court following a similar course of reasoning to that adopted in those cases. That doctrine and reasoning are also often applied where the reward or money consideration for taking a particular route or establishing a station or depot at a particular place is offered directly to the railroad company instead of to its directors, stockholders, or agents. But there are exceptions or qualifications in the application of the doctrine in such cases requiring explanation, as where a subscription is conditioned upon the adoption of a particular route, or the construction of a station or depot at a particular place.¹ There is no exception in any decision as to the character of a contract when for a pecuniary consideration directors, stockholders, or agents of a company undertake to influence its conduct in these matters. Indeed, the law is general that agreements upon pecuniary considerations, or the promise of them, to influence the conduct of officers charged with duties affecting the public interest, or with duties of a fiduciary character to private parties, are against the true policy of the State, which is to secure fidelity in the discharge of all such duties. Agreements of that character introduce mercenary considerations to control the conduct of parties, instead of considerations arising from the nature of their duties and the most efficient way of discharging them. They are, therefore, necessarily corrupt in their tendencies. As was said in *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 48, 56, 17 L. ed. 868, 871, "all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution," so of agreements like this one; they are against public policy because of their corrupt tendency, whether lawful or unlawful means are contemplated or used in carrying them into execution. "The law," as said in that case, "looks to the general tendency of such agreements; and it closes

¹*Pacific R. Co. v. Seely*, 45 Mo. 212; *Racine Co. Bank v. Ayres*, 12 Wis. 512; *Fort Edward & F. M. Pl. Road Co. v. Payne*, 15 N. Y. 583.

the door to temptation by refusing them recognition in any of the courts of the country." ¹ In regard to the exceptional class of contracts above referred to, in which an agreement has been made between an individual and a railroad corporation for the location of a station or depot at a particular place, in consideration of the donation of money or property to the corporation without any restriction or prohibition against any other location, it may be said that a contract to pay a given sum of money to one who should present a petition or proposition to the directors of a railroad company for the location of a depot on certain land the money to be paid on the location of the depot and completion of the road, is not void as against public policy, unless it appears that sinister, extraneous and corrupting influences were brought to bear upon the company to induce the location.²

No case has been found in which this question was particularly involved and the decision was adverse to the contract, which was not controlled by other considerations which condemn such an agreement. On the other hand it has been held that an agreement to pay a railroad company a stipulated sum in consideration that it would locate its route at a particular place, is valid and may be enforced.³ So a conditional subscription of stock is valid,⁴ and the voluntary grant to a railroad on condition that it would locate its route and establish a depot at a certain place, has been repeatedly sustained as not being in contravention of public policy.⁵ But an agreement giving the exclusive right of way to a railroad company, in so far as it attempts to exclude other companies from acquiring a right of way over the same tract, upon land not appropriated or required for the use of the former company, is void as against public policy.⁶

A contract by railroad companies to refrain from any effort to obtain a grant of public lands from the Legislature, and to aid

¹*Occanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 274, 28 L. ed. 589, 545.

²*Workman v. Campbell*, 46 Mo. 306.

³*Cumberland Valley R. Co. v. Baab*, 9 Watts, 458; *Cedar Rapids First Nat. Bank v. Hendrie*, 49 Iowa, 402.

⁴*New Albany & S. R. Co. v. McCormick*, 10 Ind. 499; *Courtwright v. Strickler*, 37 Iowa, 382.

⁵*McClure v. Missouri River, F. S. & G. R. Co.* 9 Kan. 373.

⁶*Kettle River R. Co. v. Eastern R. Co.* 6 L. R. A. 111, 41 Minn. 461.

another company to procure it by all reasonable and proper assistance, in consideration of a share of the grant obtained by the latter,—is void as against public policy.¹

An agreement by one member of a firm engaged in the business of procuring and selling options for the purchase of coal lands, giving a railroad company an option to purchase certain lands upon the payment of a commission to him, is not void as to the company on grounds of public policy because of a condition that it should be kept secret, where the copartner knew of and shared in the commission on a settlement.²

A contract for the sale of a portion of a subscriber's interest in stock which he subscribed for with the understanding that he should have \$5 of stock for \$1 of subscription is illegal and void under Ala. Stat. 1875, art. 14, § 6, providing that no corporation shall issue stock except for money, labor done, or money or property actually received, and all fictitious increase of stock or indebtedness shall be void.³

The same doctrine has been applied to the directors of a private corporation, charged with duties of a fiduciary character to private parties, as to public officials, on the view that it is public policy to secure fidelity in the discharge of such duties.⁴ But a stockholder in a corporation, who is also a director and has general charge of the corporate business, cannot avoid a sale of his corporate stock to the other directors below its real value, on the ground of the trust relation existing between the parties.⁵

This principle is equally applicable on the ground of public policy, although there will not be any direct private gain to the directors, but a liability is incurred by him to another contractor, for it is the right of the stockholders to have the official's judgment, as an officer of the company, exercised with a sole regard to the interests of the company. Directors of a corporation

¹*Chippewa Valley & S. R. Co. v. Chicago, St. P. M. & O. R. Co.* 6 L. R. A. 601, 75 Wis. 224.

²*Gleason v. Chicago, M. & St. P. R. Co.* — Iowa, —, 48 N. W. Rep. 88.

³*Williams v. Evans*, 6 L. R. A. 218, 87 Ala. 725.

⁴*Attoway v. Third Nat. Bank*, 10 West. Rep. 412, 93 Mo. 485; *Wardell v. Union Pac. R. Co.* 108 U. S. 651, 658, 26 L. ed. 509, 511; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 648, 82 L. ed. 819, and cases there cited. See also *Guernsey v. Cook*, 120 Mass. 501, and *Woodruff v. Wentworth*, 128 Mass. 309, 314.

⁵*Perry v. Pearson*, 135 Ill. 218.

having conspired together for the conversion of its assets, each becomes liable for any act done by one of them in furtherance of the common design.¹

A personal liability for damages on the part of the official in case the other contractor should sue for violation of contract, is calculated to be a strong incentive to the official to act contrary to the true interests of the company and of its stockholders.²

Thus it is held in *West v. Camden*, 135 U. S. 507, 34 L. ed. 254, that a contract with the president, who holds, as trustee, a controlling interest in the stock of a joint-stock company, that plaintiff should be permanently retained as vice-president of such company at a salary of at least \$5,000 per annum, is void as against public policy.

That the consideration of such contract was the sale to the company of the property and business of a competing firm in which the plaintiff was partner, and that plaintiff would unite with his co-partners in such sale, and that defendant was interested as a stockholder in the purchasing company, does not make the contract valid.

When the company, of which defendant was president, decided to reduce its expenses and a new board of directors was chosen, who elected as vice-president, in place of plaintiff, who had held the office and discharged its duties for five years, another person who agreed to serve without salary, plaintiff has no remedy against defendant on the contract.

But a contract by a railroad company, in settlement of a claim for personal injuries, to give an employé permanent employment upon a switch engine, is not void as contrary to public policy in binding the company to employ him even if incapable of service, as it will not compel the company to employ in that event.³

¹ *Wayne Pike Co. v. Hammons* (Ind.) 10 Ry. & Corp. L. J. 48.

² *Bliss v. Matteson*, 45 N. Y. 22; 1 Morawetz, Corp. §§ 516, 519.

³ *Jessup v. Chicago & N. W. R. Co.* — Iowa, —, 48 N. W. Rep. 77.

CHAPTER VI.

WHEN COURTS WILL AND WHEN THEY WILL NOT RELIEVE.

§ 23. *No Relief in Case of Fraudulent, Illegal or Immoral Contracts.*

- a. *Illegality need not be Pleaded.*
- b. *Illegal in Part—Individuals may Release Damages.*
- c. *Courts will not Enforce against Public Policy.*

24. *Relief from Illegal Contracts.*

- a. *In Pari Delicto—Ultra Vires.*
- b. *Independent of Contract—Locus Penitentia.*
- c. *Upon Executed Contract.*

§ 23. **No Relief in Case of Fraudulent, Illegal or Immoral Contracts.**—No right of action can spring out of an illegal contract; and this rule applies, not only when the contract is expressly illegal, but whenever it is opposed to public policy.¹

Contracts entered into through fraud are illegal and void, and parties thereto are, in contemplation of law, *in pari delicto*, and neither law nor equity will afford relief to either of them.²

A contract wholly void is void as to everybody whose rights would be affected by it if valid.³ The courts of this country have uniformly refused to assist either party in the enforcement of a contract to violate the law.⁴

Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves.⁵

¹*Cleveland, C. C. & I. R. Co. v. Olosser*, 9 L. R. A. 754, 126 Ind. 848.

²*McClintock v. Loiseau*, 2 L. R. A. 816, 81 W. Va. 865; *Cobbs v. Hixson*, 4 L. R. A. 683, note, 75 Mich. 260.

³*Kellogg v. Howes*, 6 L. R. A. 588, 81 Cal. 170.

⁴*Michigan Bank v. Niles*, 1 Dougl. 401, 41 Am. Dec. 588; *Jackson v. Shawl*, 29 Cal. 271; *Mitchell v. Smith*, 4 U. S. 4 Dall. 269, 1 L. ed. 838, 1 Binn. 110, 2 Am. Dec. 417; *Maybin v. Coulton*, 4 U. S. 4 Dall. 296, 1 L. ed. 841; *Duncanson v. M'Lure*, 4 U. S. 4 Dall. 808, 1 L. ed. 845.

⁵*Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632; *Nichols v. Ruggles*, 3 Day. 145, 3 Am. Dec. 262.

a. Illegality need not be Pleased.—The illegality of the contract in suit can be considered, although not affirmatively pleaded.¹ Parties concerned in illegal agreements are to be left without remedy against each other.² The law aids no one to violate its behests, but leaves a party as it finds him, remediless to the consequences of his own folly and turpitude.³

One who advances money to a majority stockholder to enable him to recover in his own name and for his own use a judgment properly belonging to the corporation, and with knowledge that the corporation was being thereby deprived of its property, will not be allowed his advances, on the distribution of the fund thus realized.⁴

Courts will not decree the nullity of the contract sought to be enforced, but will simply abstain from dealing with it or adjudicating any rights arising thereunder, or giving their aid for the division of results, although ascertained, between the parties.⁵

Courts will not relieve a party from the consequence of his intentional fraudulent or his negligent act.⁶

Where a scheme or contract is *malum in se*, and the parties to it are *in pari delicto*, the law refuses to aid either of them against the other, but leaves them where they placed themselves by their own acts.⁷

Where the parties are concerned in illegal agreements or other transactions whether they are *mala prohibita* or *mala in se*,

¹*Occanyan v. Winchester Rep. Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258, 6 L. ed. 468; *Hannay v. Eve*, 7 U. S. 8 Cranch, 242, 2 L. ed. 427; *Patton v. Nicholson*, 16 U. S. 8 Wheat. 204, 4 L. ed. 871.

²*Kirkpatrick v. Clark*, 8 L. R. A. 511, 132 Ill. 842; *Riedle v. Mulhausen*, 20 Ill. App. 68; *Canton Masonic Mut. Benev. Soc. v. Rockhold*, 26 Ill. App. 141; *Harrison v. McCluney*, 82 Mo. App. 481; *Cambioso v. Maffett*, 2 Wash. C. C. 98; *Bartle v. Nutt*, 29 U. S. 4 Pet. 184, 7 L. ed. 825; *Craig v. Missouri*, 29 U. S. 4 Pet. 410, 7 L. ed. 908.

³*Am. L. Ins. & T. Co. v. Dobbin*, Hill & D. 259; *Nellis v. Clark*, 20 Wend. 24, 4 Hill, 424; *Perkins v. Savage*, 15 Wend. 412; *De Groot v. Van Duzer*, 20 Wend. 898.

⁴*Davis v. Gemmell* (Md.) 9 Ry. & Corp. L. J. 442.

⁵*Texas & P. R. Co. v. Southern P. R. Co.* 41 La. Ann. 970, 40 Am. & Eng. R. Cas. 475; *Samuel v. Oliver*, 130 Ill. 73.

⁶*Rowland v. Martin* (Pa.) 4 Cent. Rep. 760.

⁷*Burt v. Place*, 6 Cow. 481; *Nellis v. Clark*, 20 Wend. 24, 4 Hill, 424; *Thomas v. Richmond*, 79 U. S. 12 Wall. 849, 20 L. ed. 453; *Smith v. Hubbs*, 10 Me. 71; *Schermerhorn v. Talman*, 14 N. Y. 94; *Knowlton v. Congress & E. Spring Co.* 57 N. Y. 518; *Houison v. Hancock*, 8 T. R. 575.

courts of equity follow the rule of law as to participators in crime, and will not grant relief in accordance with the maxim "*in pari delicto potior est conditio defendentis*."

It is contrary to public policy to give the aid of the courts to the vendor, who knew that his goods were purchased, or to the lender who was aware that his money was borrowed, for the purpose of being employed in the commission of a criminal act injurious to society or to any of its members.¹

A party to an illegal trust combination, who, in pursuance of the agreement, has furnished goods in the name of the trustee, cannot claim the proceeds as against a receiver of the trust assets, although he withdrew from the combination before the receiver was appointed.²

Where losses have been made in an illegal transaction, a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used.³ The rule however seems to be less exacting in some states.⁴ Where one conveys land to secure the grantee's public influence, to defeat the extension of a street across his land, and the grantee dies before re-conveying, the heirs will not be compelled to re-convey to the grantor.⁵

Where two or more parties have united in a transaction to defraud another or others, or the public, or the due administration of justice, or where it was against public policy, or contrary to good morals, no one of them can maintain a suit thereon against any other.⁶

A court of equity will not lend its aid to require an account of profits and a division thereof, although the contract has been executed.⁷

Whatever the parties have fraudulently or illegally contracted to execute, the law refuses to compel the contractor to execute,

¹*Hanauer v. Doane*, 79 U. S. 12 Wall. 342, 20 L. ed. 489.

²*Pittsburgh Carbon Co. v. McMillin*, 7 L. R. A. 46, 24 Abb. N. C. 96.

³*Armstrong v. American Exch. Nat. Bank*, 133 U. S. 483, 33 L. ed. 747.

⁴*Labbe v. Corbett*, 69 Tex. 508.

⁵*Slocum v. Wooley*, 9 Cent. Rep. 659, 43 N. J. Eq. 451.

⁶*York v. Merritt*, 77 N. C. 213; *Wright v. Rindskopf*, 43 Wis. 344.

⁷*Craft v. McConoughy*, 79 Ill. 346.

but it will enforce a by-law of a press association suspending a member for the use of other local news agencies.

An agreement of a director of a corporation with its attorney to use his vote to the disadvantage of the corporation, and for personal interests, is immoral and will not be enforced.¹

Parties to a contract which is void as against public policy cannot be relieved, one against the other, on the ground that the thing contracted for was lawful and beneficial in itself, and that one has received and retained the benefit under it.² Nor will courts assist a person who has participated in a transaction forbidden by statute, to assert rights growing out of, or to relieve himself from the consequences of his own illegal act.³

Equity will not relieve from securities executed to shield a person from prosecution for a felony of which he is guilty, upon the ground that execution for such purpose rendered them void. One who has executed and delivered securities in consideration of a promise to refrain from a prosecution for felony of a person guilty thereof cannot, after his illegal purpose has failed from causes other than a breach of the contract, and a prosecution has been commenced by third parties, rescind the contract and recover back the securities.⁴

The moment the fact of illegality appears, the court will refuse relief to either party, but will leave them where their illicit agreement placed them.⁵

Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons against the other, from the consequences of their own misconduct.⁶

Where property is transferred in fraud of creditors, equity will

¹*Pepper v. Haight*, 20 Barb. 438; *Mathews v. N. Y. Asso. Press*, 40 N. Y. S. R. 538.

²*Attaway v. Third Nat. Bank*, 10 West. Rep. 412, 93 Mo. 485.

³*Gleason v. Chicago, M. & St. P. R. Co.* — Iowa, —, 43 N. W. Rep. 517.

⁴*Parsons v. Randolph*, 4 West. Rep. 865, 21 Mo. App. 353.

⁵*Shattuck v. Watson*, 7 L. R. A. 551, 53 Ark. 147.

⁶*Allison v. Hess*, 33 Iowa, 389; *Bartle v. Nutt*, 29 U. S. 4 Pet. 184, 7 L. ed. 825; *Irwin v. Wells*, 1 Mo. 9; *Hamilton v. Close*, 35 Mo. 166; *Brown v. Finley*, 18 Mo. 375; *Tyler v. Larimore*, 2 West. Rep. 177, 19 Mo. App. 445.

⁷*Dent v. Ferguson*, 133 U. S. 50, 33 L. ed. 242.

refuse relief to either party, and leave them in precisely the position in which they have placed themselves.¹

One who, in order to keep his creditors from reaching land owned by him, allows the title to stand in the name of another, cannot ask equity to aid him in recovering the land.²

A grantor in a conveyance fraudulent as against his creditors can have no relief against the deed, although he may have since paid his creditors.³

The heirs of a fraudulent grantor have no more right than the grantor himself would have to enforce a reconveyance of the property.⁴

A judgment debtor cannot defeat his own fraudulent conveyance by purchasing the property conveyed, through another, under a subsequent judgment against himself.⁵

An agreement between grantor and grantee, made upon the conveyance of property, and which reserves to the grantor the enjoyment of the rents and profits of the property conveyed, to which the creditors of the grantor have a right of immediate appropriation to their debts, and which involves a secret trust for a return to the grantor of property of which such creditors have the immediate right of sale,—will not be enforced; but the parties will be left in the position where they have placed themselves, although the grantee refuses to perform his part of the fraudulent agreement with the grantor.⁶

b. Illegal in Part—Individuals may Release Damages.—Courts of justice, even with the consent of the opposite party, will not enforce a right or contract in violation of a statute, although not expressly declared void by the enactment.⁷

While a court cannot enforce an agreement, any part of the

¹*Beadle v. Beadle*, 40 Fed. Rep. 815; *Barnes v. Gill*, 21 Ill. App. 129; *Tyler v. Tyler*, 126 Ill. 525, 9 Am. St. Rep. 642; *Dent v. Ferguson*, 182 U. S. 50, 88 L. ed. 242.

²*Catoe v. Catoe*, 82 S. C. 595; *Weatherbee v. Cockrell*, 44 Kan. 360.

³*Brown v. Reilly*, 72 Md. 489.

⁴*McElroy v. Hiner*, 183 Ill. 156.

⁵*Etaner v. Heileman*, 9 L. R. A. 96, 52 N. J. L. 378.

⁶*Dent v. Ferguson*, 182 U. S. 50, 88 L. ed. 242.

⁷*Bank of United States v. Owens*, 27 U. S. 2 Pet. 527, 7 L. ed. 508; *Coppell v. Hall*, 74 U. S. 7 Wall. 542, 19 L. ed. 244.

entire consideration of which is illegal,' yet where the illegality is not in the consideration as an entirety, but the things to be done are distinct acts, and are some of them legal and some illegal, the court may enforce the performance of the legal acts.' A contract which would be lawful under ordinary conditions, may be rendered illegal where both parties intend to accomplish an unlawful object. Thus, the owner of a building, who willfully suffers it to be used for the illegal sale of spirituous liquors, cannot recover for its use and occupation.' Or where one has such intent and the other is informed thereof, but if such unlawful intention of the one is unknown to the other, the latter may disaffirm or carry out the contract on his discovery of the illegal intent pending the final execution of the contract.' But unless the use intended to be made of property purchased is for an immoral purpose, or constitutes a felony, the mere suspicion or even knowledge of the seller will not defeat a recovery of the price.'

Although an act is in itself illegal, and such as any member of the general public may claim reparation for damages occasioned thereby, yet an individual member of the public may, by contract, waive his particular claim on that account.'

c. Courts will not Enforce against Public Policy.—The power of a court of equity cannot be invoked where there is an

¹ *Waite v. Jones*, 1 Bing. N. C. 656, 662; *Foley v. Speir*, 1 Cent. Rep. 716, 100 N. Y. 552; *James v. Jollison*, 94 Ind. 292; *Bixby v. Moor*, 51 N. H. 402; *Perkins v. Cummings*, 2 Gray, 258; *McQuade v. Rosecrans*, 86 Ohio St. 442; *Filson v. Himes*, 5 Pa. 452; *Covington v. Theadgill*, 88 N. C. 186; *Chandler v. Johnson*, 89 Ga. 85; *Pueblo & A. V. Co. v. Taylor*, 6 Colo. 1; *Widoe v. Webb*, 20 Ohio St. 431; *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Cotten v. McKenzie*, 57 Miss. 418; *Wilson v. Rankin*, L. R. 1 Q. B. 168.

² *State v. Board of Education*, 85 Ohio St. 519, 527; *Erie R. Co. v. Union L. & Exp. Co.* 85 N. J. L. 240; *Pennsylvania Co. v. Wentz*, 37 Ohio St. 833, 839; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 221, 17 L. ed. 581; *Western U. Teleg. Co. v. Burlington & S. W. R. Co.* 8 McCrary, 180.

³ *Mitchell v. Scott*, 62 N. H. 596.

⁴ *Pearce v. Brookes*, L. R. 1 Exch. 218; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 272, 6 L. ed. 472; *Hanauer v. Doane*, 79 U. S. 12 Wall. 842, 846, 20 L. ed. 439, 440; *Lewis v. Latham*, 74 N. C. 288; *Smitherman v. Sanders*, 64 N. C. 522; *Oxford Iron Co. v. Quinchett*, 44 Ala. 487; *Roquemore v. Alloway*, 38 Tex. 461.

⁵ *Bickel v. Sheets*, 24 Ind. 1; *Armfield v. Tate*, 29 N. C. 258; *Tracy v. Talmage*, 14 N. Y. 162; *Cheney v. Duke*, 10 Gill & J. 11; *Rose v. Mitchell*, 6 Colo. 102; *Bishop v. Honey*, 84 Tex. 245; *McKinney v. Andrews*, 41 Tex. 863; *Steele v. Curle*, 4 Dana, 381.

⁶ *Egan v. Russ*, 39 La. Ann. 967.

adequate remedy, or full compensation can be obtained, in an action at law; and a court of equity is equally adverse to exercise its authority by way of injunction, to compel one, even under an express contract, to work for another at a stipulated price. Equity will not use its special power against the general policy of the law, which favors entire freedom of the laborer in selecting his field of employment, and his employer, and this policy forbids a court of equity to interfere even when he has bound himself by contract as to both. This is illustrated in two cases decided December 10th, 1891, not yet reported, in which, at Memphis, Tenn., *Judge Hammond*, in the United States Circuit Court, refused the application of the Louisville and Nashville Railroad Company, for an injunction to compel the Memphis Cotton Compress Company to comply with its contract to compress cotton bales at 10 cents per 100 pounds. The compress company has a monopoly of compressing cotton, having bought or driven out all competitors, and it has a contract with all the railroad companies to compress cotton for five years at 10 cents per hundred. However, to make up recent heavy losses by fire, or for other reasons, it has notified all the railroad companies that they must pay 12 cents per hundred for compression, and it refuses to perform the contract.

There being no other compress company available, this leaves the railroads no alternative but to pay the extra price, unless the compress company could be compelled by injunction to perform its contract. As soon as the notice was given the Newport News and Mississippi Valley Company filed a bill to compel the compress company to take 10 cents, but *Judge Hammond* refused the injunction because it did not appear that the contract had been actually violated. Only a proposition had been made to charge more for compression.

The Louisville and Nashville Railroad Company also filed a bill, which alleged the tender of cotton for compression, and the refusal to do the work for less than 12 cents; also that the compress company was ignoring the stipulation to compress only for the railroads and was working for shippers direct, and demanding 12 cents.

The injunction was refused on the ground that a court of equity

will not compel anyone to work for another at a stipulated price, but it leaves the injured party to bring an action for damages at law. This being an adequate remedy, the jurisdiction of equity is forbidden to United States courts by an Act of Congress.

The railroad company contended that the public interest was affected by the disturbance of freight rates and disastrous competition with points where compression of cotton could be done for less price than demanded at Memphis, but *Judge* Hammond ruled that the public policy which forbids unnecessary interference by courts with the conduct of business under contracts, and forbids a jurisdiction that would restrict by such orders the freedom of the economic laws of trade and commerce, was as important as the other consideration urged in favor of the injunction, and denied the application.

§ 24. Relief from Illegal Contracts.

a. *In Pari Delicto—Ultra Vires.*—It is a rule of law, well recognized, that where parties to a contract are *in pari delicto*, one of them shall not avail himself of fraud in the contract to prevent the other from recovering on his share of the profits, after the contract is executed, if the other can make out his case otherwise than through the medium or by the aid of the illegal transaction to which he himself was a party;¹ but in cases where both parties are *in delicto*, concurring in the illegal act, it does not always follow that they stand *in pari delicto*, for there may be and very often are very different degrees in their guilt.²

The maxim "*In pari delicto potior est conditio defendentis et possidentis*" is not of universal prevalence. An exception arises where the parties to the transaction, although concurring in the illegal act, are regarded as not equally guilty in consequence of fraud, imposition or hardship practiced by one party against the other, thereby obtaining an unconscionable advantage.³

¹But see *Deming v. Merchants Cotton Press & S. Co.* (Tenn.) 13 L. R. A. 518.

²*Broom, Legal Maxims*, 645; *Hunt v. Whitehead*, 42 Mo. 524.

³Taylor, "Jurisprudence," § 300.

⁴*Küchen v. Greenbaum*, 61 Mo. 116; *Green v. Corrigan*, 3 West. Rep. 627, 87 Mo. 359.

Where the defendant has been from beginning to end the principal law-breaker, the party taking advantage of its relations with the plaintiff, and the power thereby acquired and maintained by it over the plaintiff, to promote its own schemes and enterprises, the two parties are not *in pari delicto*, whatever meaning be given to the word *delictum*.¹

The fact that a transaction is against public policy in law will not prevent a remedy against one party, who is guilty of fraud by means of his persuasive or other influence over the other party, in favor of the latter, who is not consciously wrong, but who is actually deceived by the fraud and misrepresentations of the former party.²

When an innocent member of a firm established for the conduct of lawful and moral business calls upon his partner for a share of profits made in partnership transactions, the partner will not be absolved from the duty of dividing, on showing that he realized the profits by cheating the customers of the firm.³

A railroad company which continues to operate a rival and competing line under a prior contract, after the passage of a statute prohibiting such contracts and making the company which operates a rival line subject to penalty, although such continuation was illegal, cannot retain the money acquired by such operation when called upon by the owner of the road for an accounting, but the latter, not being *in pari delicto*, is entitled to an equitable share of the earnings.⁴

The plea of *ultra vires* should not prevail, whether interposed for or against a corporation, when it would not advance justice, but would perpetrate a wrong.⁵

¹*Smith v. Cuff*, 6 Maule & S. 165; *Smith v. Bromley*, 2 Doug. 296, note; *White v. Franklin Bank*, 22 Pick. 181; *Worcester v. Eaton*, 11 Mass. 368; *Schermmerhorn v. Talmán*, 14 N. Y. 98; *Tracy v. Talmage*, 14 N. Y. 162; *Jacques v. Golightly*, 2 W. Bl. 1078; *Browning v. Morris*, Cowp. 790; *Williams v. Hedley*, 8 East, 878; *Ford v. Harrington*, 16 N. Y. 285; *Osborne v. Williams*, 18 Ves. Jr. 879; *Harrington v. Grant*, 54 Vt. 236.

²*Hess v. Oulter*, 6 L. R. A. 496, 77 Mich. 598.

³*Pennington v. Todd* (N. J.) 11 L. R. A. 589.

⁴*Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 9 L. R. A. 689, 3 Inters. Com. Rep. 819.

⁵*Chicago & A. R. Co. v. Derkes*, 1 West. Rep. 555, 108 Ind. 520; *Whitney Arms Co. v. Barlow*, 68 N. Y. 62.

The law sustains a defense of this nature only when an imperative rule of public policy requires it.¹

The rule against granting relief to a party to an illegal contract does not apply to prevent a receiver from recovering the fruits of the transaction for the benefit of honest creditors.²

The rule that, where one transfers property to another for the purpose of cheating his creditors, the court will not aid him to recover it back, does not apply where the plaintiff and defendant were not *in pari delicto*, the defendant being the plaintiff's lawyer, under whose direction the latter acted and followed his advice that transfers were necessary to protect and cover up the property of his deceased father against the assaults of creditors.³

But on the dissolution of an illegal partnership or combination to monopolize the manufacture and sale of a commodity, and the appointment of a receiver, neither the receiver nor any party to the illegal agreement can have any equitable relief based upon alleged rights growing out of such illegal combination.⁴

Since, on the dissolution of a corporation which had entered into an illegal combination or copartnership with others to monopolize the manufacture and sale of a commodity, the copartnership is dissolved, and a receiver of the corporation cannot enforce the right to have an accounting under the partnership agreement because of its illegality, he has no right that a court of equity can enforce, or which will justify a decree that a contract between the parties, to which he was not a party, should be canceled or declared illegal.⁵

But the court will not refuse to enforce an express trust for the reason that the conveyance to the trustee, who has declared the trust, was to delay, hinder, and defraud the grantor's wife in obtaining alimony and maintenance in a suit which it was appre-

¹ *Wright v. Pipe Line Co.* 101 Pa. 204. See also *Steam Nav. Co. v. Wood*, 17 Barb. 378; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Silver Lake Bank v. North*, 4 Johns. Ch. 370, 1 L. ed. 871; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648; *Standard Oil Co. v. Scofield*, 16 Abb. N. C. 872.

² *Pittsburgh Carbon Co. v. McMillin*, 7 L. R. A. 46, 119 N. Y. 46, 24 Abb. N. C. 96.

³ *Place v. Hayward*, 117 N. Y. 487.

⁴ *Gray v. Oxnard Bros. Co.* 81 N. Y. S. R. 968.

hended she was about to commence. The rule as to secret trusts does not apply.¹

b. **Independent of Contract—Locus Pœnitentiæ.**—If the plaintiff requires any aid from the illegal transaction in order to enable him to sue his claim, he cannot enforce it.²

Where a contract grows immediately out of, and is connected with an illegal or immoral act, it will not be enforced.³ The test to determine whether the action arises *ex stirpe causa*, is the plaintiff's ability to establish his case without any aid from the illegal transaction. If his cause or right to recover depends upon a transaction which is *malum in se* or prohibited by law, and which he must prove in order to make out his case, he cannot recover.⁴

An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case.⁵

Money paid on an illegal contract, which remains executory, can be recovered back in an action founded on a disaffirmance and on the ground that it is void.⁶ Where parties have come to a *locus pœnitentiæ*, the courts allow them to recover money advanced. In such cases the contract is not the basis of a suit but the rescission of it.⁷

If an agreement is legally void and unenforceable by reason of some statutory or common law prohibition, which does not involve any positive immorality, and there is no other reason of public

¹ *Tyler v. Tyler*, 25 Ill. App. 833.

² *Callagan v. Hallett*, 1 Cal. 104; *Forsythe v. State*, 6 Ohio, 21; *Simpson v. Bolles*, 7 Taunt. 246.

³ *Jones v. Surprise*, 4 New Eng. Rep. 295, 64 N. H. 243.

⁴ *Martin v. Hodge*, 47 Ark. 378; *Taylor v. Larimore*, 2 West. Rep. 180, 19 Mo. App. 445; *Suits v. Taylor*, 2 West. Rep. 579, 20 Mo. App. 166.

⁵ *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258, 6 L. ed. 468; *Fiskney v. Reynolds*, 4 Burr. 2069; *Petrie v. Hannay*, 8 T. R. 418; *Farmer v. Russell*, 1 Bos. & P. 296; *Planters Bank v. Union Bank*, 63 U. S. 16 Wall. 488, 21 L. ed. 473; *McBlair v. Gibbs*, 58 U. S. 17 How. 282, 386, 15 L. ed. 182, 183; *Brooks v. Martin*, 69 U. S. 2 Wall. 70, 17 L. ed. 783; *Bly v. Second Nat. Bank*, 79 Pa. 453; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 438, 33 L. ed. 747.

⁶ *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24.

⁷ *Congress & E. Spring Co. v. Knowlton*, 108 U. S. 49, 26 L. ed. 347; *Skinner v. Henderson*, 10 Mo. 205; *Adams Exp. Co. v. Reno*, 48 Mo. 264; *White v. Franklin Bank*, 28 Pick. 181; *Brown v. Timmany*, 20 Ohio, 81.

policy why the courts should refuse to grant relief, a party who has received anything under it from the other party, and has failed to perform on his part, must account to the other for what he has received.¹

Where real estate is sold by means of a lottery scheme, but the lottery transaction does not appear on the face of the deed, the grantor cannot avoid it by showing his own share in the illegal transaction.²

The party receiving property transferred under a contract merely *malum prohibitum* may be made to refund the value of that which it has actually received to the person from whom it has received the property for the unauthorized purpose.³

If money is paid for an illegal purpose or goods delivered, the person who has so paid or delivered may recover them back before the illegal purpose is carried out; but if he delays until this is done, or if he seeks to enforce the illegal transaction, he will fail.⁴ The rule is generally applied, even if the parties are *in pari delicto*, disregarding the question who is most in fault.⁵

A contract with the State, procured by bribery upon the officers having power to make it, is against public policy and void; and where the briber has paid money on the contract, the courts will relieve him where he stands, and cancel the contract, without decreeing a return of the money.⁶

c. **Upon Executed Contract.**—Although contracts cannot be enforced, yet if parties carry them out they become entitled to claim the promise or payment due in respect of it in some cases.⁷

A private corporation cannot be allowed to interpose the plea

¹*Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 9 L. R. A. 689, 3 Inters. Com. Rep. 319.

²*Allebach v. Hunsicker*, 133 Pa. 849.

³*Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107.

⁴*Taylor v. Bowers*, L. R. 1 Q. B. Div. 291; *Lowry v. Bourdieu*, 2 Dougl. 468; *Tappenden v. Randall*, 2 Bos. & P. 467; *Hastelow v. Jackson*, 8 Barn. & C. 231; *Bone v. Ekless*, 5 Hurlst. & N. 925; *Lacausade v. White*, 7 T. R. 535; *Colton v. Thurland*, 5 T. R. 405; *Smith v. Bickmore*, 4 Taunt. 474; *Munt v. Stokes*, 4 T. R. 561; *Morgan v. Groff*, 4 Barb. 524; *Ulica Ins. Co. v. Kip*, 8 Cow. 20; *Merritt v. Millard*, 4 Keyes, 208; *White v. Franklin Bank*, 22 Pick. 181; *Lovell v. Boston & L. R. Corp.* 28 Pick. 24; *Thomas v. Richmond*, 79 U. S. 12 Wall. 349, 20 L. ed. 453.

⁵*Congress & E. Spring Co. v. Knowlton*, 108 U. S. 49, 26 L. ed. 347.

⁶*State v. Cross*, 88 Kan. 696.

⁷*Leake*, Cont. Lond. 1878, 738; *Bishop v. Kitchen*, 38 L. J. N. S. Q. B. 20.

of *ultra vires* where its contract has been performed by the other party and the corporation has had the benefit of the contract and its performance.¹

Where contracts are positively immoral or illegal, the property earned from them will be dealt with according to equity, and the contract will define the relation of the parties to the property.²

The agreement having been executed, the parties, having submitted to its terms, are clearly entitled to the benefit of the consideration stipulated.³

The court will not refuse to deal with the property, on the ground that it was acquired under an illegal contract.⁴

Where losses have been made in an illegal transaction, a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used.⁵

¹*Camden & A. R. Co. v. May's Landing & E. H. O. R. Co.* 4 Cent. Rep. 801. 48 N. J. L. 530; *Denver F. Ins. Co. v. McClelland*, 9 Colo. 11; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Hall Mfg. Co. v. American R. S. Co.* 48 Mich. 881; *Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co.* 83 Pa. 160; *Bradley v. Ballard*, 55 Ill. 418, 417; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. ed. 693, 695; *Pneumatic Gas Co. v. Berry*, 113 U. S. 822, 827, 28 L. ed. 1008; *Union Water Co. v. Murphy's Flat Fluming Co.* 22 Cal. 620; *State Board of Agriculture v. Citizens S. R. Co.* 47 Ind. 407; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343, 353; *Slater Woolen Co. v. Lamb*, 8 New Eng. Rep. 443, 143 Mass. 420; *Hall v. Paris*, 59 N. H. 74; *Norton v. Derry Nat. Bank*, 61 N. H. 589; *Parish v. Wheeler*, 22 N. Y. 494; *Dorst v. Gale*, 83 Ill. 187; *Ward v. Johnson*, 95 Ill. 315; *Peoria & S. R. Co. v. Thompson*, 108 Ill. 187; *Steamboat Co. v. McCutcheon*, 13 Pa. 18; *Terry v. Eagle Lock Co.* 47 Conn. 141; *De Groff v. American Linen Thread Co.* 21 N. Y. 124, 127; *Underwood v. Newport Lyceum*, 5 B. Mon. 129; *Southern L. Ins. & T. Co. v. Lanier*, 5 Fla. 110, 165; *Chicago Bldg. Soc. v. Crowell*, 65 Ill. 458; *Pine Grove Twp. v. Talcott*, 86 U. S. 19 Wall. 696, 678, 22 L. ed. 227, 283; *Rutland & B. R. Co. v. Proctor*, 29 Vt. 93; *Prairie Lodge v. Smith*, 58 Miss. 301, 308; *Hitchcock v. Galveston*, 96 U. S. 341, 351, 24 L. ed. 659, 663; *Ossipee H. & W. Mfg. Co. v. Canney*, 54 N. H. 295, 313, 327; *Pierce, Railroads*, 519, *et seq.*; *Waterman*, Spec. Perf. § 226; *Morawetz*, Priv. Corp. §§ 648-653, 689-699.

²*Planters Bank v. Union Bank*, 88 U. S. 16 Wall. 483, 21 L. ed. 473; *Western U. Teleg. Co. v. Burlington & S. W. R. Co.* 3 McCrary, 138, 139; *Cook v. Sherman*, 4 McCrary, 33.

³*Irwin v. Williar*, 110 U. S. 499, 509, 510, 28 L. ed. 225, 230; *Roundtree v. Smith*, 108 U. S. 269, 276, 27 L. ed. 722, 724; *Stewart v. Schall*, 3 Cent. Rep. 509, 65 Md. 307, 308; *Gilbert v. Gaugar*, 8 Biss. 214.

⁴*W. U. Tel. Co. v. Burlington & S. W. R. Co.* 11 Fed. Rep. 1.

⁵*Armstrong v. Toler*, 24 U. S. 11 Wheat. 258, 6 L. ed. 468; *Kimbro v. Bullett*, 63 U. S. 22 How. 256, 269, 16 L. ed. 313, 317; *Planters Bank v. Union Bank*, 88 U. S. 16 Wall. 500, 21 L. ed. 490; *Tyler v. Carlisle*, 4 New Eng. Rep. 409, 79 Me. 210; *McGavock v. Puryear*, 6 Coldw. 34; *Wagh v. Beck*, 5 Cent. Rep. 536, 114 Pa. 422; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 33 L. ed. 747.

Mere knowledge on the part of a person loaning money that the borrower intends to use it by engaging in the purchase of options on grains in the market of another State, or investing it in wagering or gambling contracts, will not defeat an action by the lender to recover back the amount loaned.¹

¹*Jackson v. City Nat. Bank*, 9 L. R. A. 657, 125 Ind. 347.

CHAPTER VII.

CONTRACTS AFFECTING MARRIAGE.

- § 25. *Contracts to Promote or Rupture the Marriage Relation.*
26. *A Contract for Immediate Separation and Support, or for Support after Accomplished Separation, Valid.*
27. *Agreement for Separation and Support Supersedes only in Part Marital Duties.*
28. *Trustee in Marital Separation not Essential, but Husband Treated as Trustee, and not Criminally Liuble for Non-support.*
29. *Contract Void when Immediate Separation not Contemplated.*
30. *Contracts Regarding Property, but in Partial Restraint of Marriage.*

§ 25. **Contracts to Promote or Rupture the Marriage Relation.**—Marriage is always favored as promoting morality, and as a means of increasing the strength and prosperity of the State, and it is universally held a good consideration to sustain a contract.¹

In *Shadwell v. Shadwell*, 9 C. B. N. S. 159, an uncle wrote to his nephew as follows: "My dear Lancey: I am so glad to hear of your intended marriage with Ellen Nicholl, and, as I promised to assist you at starting, I am happy to tell you that I will pay you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require. Your affectionate uncle, Charles Shadwell." It was held that the promise was binding, and made upon good consideration. So also marriage is a good consideration for a deed.²

It is declared by the courts a consideration of the highest value. There is no consideration so much respected in law as the consideration of marriage. Co. Litt. 9 (6). It runs through the entire

¹*Harrison v. Trader*, 27 Ark. 290; *McCaw v. Burk*, 31 Ind. 62; *Richardson v. Schultz*, 98 Ind. 425; *Frank's App.* 59 Pa. 194; *Butterfield v. Stanton*, 44 Miss. 86; *Wright v. Wright*, 54 N. Y. 440; *Herring v. Wickham*, 29 Gratt. 628, 26 Am. Rep. 410.

²*Gibson v. Bennett*, 4 New Eng. Rep. 413, 79 Me. 302.

settlement and supports all parts of it, thus making marriage not only a high, but the highest consideration known to the law.¹

An agreement by a father with the future husband of his illegitimate daughter, to settle, at his, the father's, death, his "whole estate" upon the husband, in consideration of the marriage, is valid, and will bind the property belonging to the father at the time of his death.²

A verbal promise made by a father to the husband of his daughter before his marriage, to convey certain land to him, is founded on the highest consideration and is a sufficient consideration for a written agreement for that purpose after the marriage.³

If a father promises A that if he will marry his daughter, he will give a certain amount as a marriage portion, and if in contemplation of such promise A afterwards marries the daughter, the father will be bound by the promise.⁴

If A promise B that if he and A's daughter marry, "he will endeavor to do her equal justice with the rest of his daughters, as fast as it is in his power, with convenience," and the marriage be afterwards had with his consent, the promise is not void for uncertainty, and is sustained by a sufficient consideration. Such promise is to be treated not as made in the interest of the wife alone, but to the husband and wife jointly, not to be satisfied by a conveyance of land to the wife alone; but the husband may elect to consider it a personal contract, and, if he survives his wife, sue thereon in his own name.⁵

A promised B if he would get himself a wife and have a child, he would give him \$500. In an action by B to recover this sum from the executor of A, the condition having been fully performed, relying on the promise, the promise was held to be supported by a good consideration.⁶

¹*Ford v. Stuart*, 15 Beav. 499; *Nairn v. Prouse*, 6 Ves. Jr. 752. See *Magniac v. Thompson*, 33 U. S. 7 Pet. 348, 8 L. ed. 709; *Prewitt v. Wilson*, 103 U. S. 23, 26 L. ed. 360; *De Barante v. Gott*, 6 Barb. 497; *Wood v. Jackson*, 8 Wend. 26; *Dugan v. Gittings*, 3 Gill, 188, 43 Am. Dec. 312; *Wright v. Wright*, 54 N. Y. 440.

²*Wall v. Scales*, 1 Dev. Eq. 472.

³*Argenbright v. Campbell*, 3 Hen. & M. 144.

⁴*Ogden v. Ogden*, 1 Bland, Ch. 284.

⁵*Chichester v. Vass*, 1 Munf. 98.

⁶*Gurvin v. Oromartie*, 36 N. C. 174.

The law favors an ante-nuptial settlement executed in good faith, and the agreement will be considered as having embodied the real intention of the parties at its date, and therefore conclusive of the rights of the parties to it; and the resumption of her marital duties by a wife, who has voluntarily estranged herself from her husband because of her dissatisfaction with such a contract, is no consideration for a revocation of the settlement, substituting therefore her rights under a statute. There must be a meritorious or valuable consideration for such a revocation of an anti-nuptial settlement.¹ Where the sole inducement was the doing of that which the wife was legally bound to do—the estrangement having been without justification, and a wanton abuse of the marital relation for mercenary purposes, reconciliation was her duty—public policy forbids that the performance of such duty be made the subject of barter and sale. The law fixes and regulates the marital relation on public consideration and will not allow the parties to discard and renew it for money.* Thus in *Roberts v. Frisby*, 38 Tex. 229, the Supreme Court held that the husband is not legally bound by a post-nuptial contract in which he hires his wife to live with him. The same principle was affirmed by the Supreme Court of Tennessee in *Copeland v. Boaz*, 9 Baxt. 223; and *Mr. Justice Allen* of the Supreme Judicial Court of Massachusetts well said: “It is as much against public policy to restore interrupted conjugal relations as it is to continue them without interruption for the same consideration. The right of condonation is not exercised for the sake of justice to the injured party, or with regard to the rights of others or the interests of the public when it is sold for money, and the law cannot recognize such a consideration.”²

An undertaking to procure a marriage between two parties for a reward is void,³ and all marriage brokerage contracts are by the courts pronounced illegal.⁴

¹*Stickney v. Borman*, 2 Pa. 67.

²*Kesler's Estate*, — Pa. —, 18 L. R. A. 581.

³*Merrill v. Peaslee*, 146 Mass. 480; but see *Adams v. Adams*, 91 N. Y. 381.

⁴*Hall v. Potter*, 8 Lev. 411; *Fuller v. Dame*, 18 Pick. 472; *Crawford v. Russell*, 62 Barb. 92; *Roberts v. Roberts*, 8 P. Wms. 75, note 1; *Johnson v. Hunt*, 81 Ky. 821; *Arundel v. Trevillian*, 1 Rep. in Ch. 87; *Sterling v. Sinnenickson*, 5 N. J. L. 756; *Scribblehill v. Brett*, 4 Brown's Par. Cas. 144.

⁵*James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151; *Keat v. Allen*, 8 Allen (N. B.) 588; *Duval v. Wellman*, 124 N. Y. 156.

A contract providing, in consideration of certain assessments paid and to be paid by a single man, that an association will pay a certain sum to his wife at marriage, if married to him at the expiration of two years, is illegal.¹

A claim for services rendered to a man in procuring for him a wife is invalid, it being against public policy to allow marriage brokerage.² So any contract which has for its purpose a rupture of the marriage relation, is void.³

§ 26. A Contract for Immediate Separation and Support, or for Support after Accomplished Separation, Valid.—It was reluctantly held by the chancellor in *Carson v. Murray*, 3 Paige, 500, 3 L. ed. 248, and then only upon the principle of *stare decisis* as evinced by *Baker v. Barney*, 8 Johns. 73, and *Shelthar v. Gregory*, 2 Wend. 422, following the English decisions prior to the Revolution, that a valid agreement for an immediate separation between husband and wife and for a separate allowance for her support, may be made through the medium of a trustee.

The case of *Carson v. Murray*, 3 Paige, 483, 3 L. ed. 241, was upon a bill in equity by the wife against the executors of her husband, based upon an agreement of separation, for its enforcement out of the estate of the deceased husband.⁴ See also *Chapin v. Chapin*, 135 Mass. 393. But where the agreement was concealed from the court pending the divorce proceedings, it cannot always be enforced.

The case of *Baker v. Barney*, 8 Johns. 72, was an action to recover of the husband the price of suitable goods sold to the wife after the separation of husband and wife, under an agreement making provision for the support of the wife.

¹*State v. Tivole*, 6 New Eng. Rep. 460, 80 Me. 287.

²*Antcliffe v. Juna*, 10 L. R. A. 621, 81 Mich. 477.

³*Sayles v. Sayles*, 21 N. H. 812; *Goodwin v. Goodwin*, 4 Day, 343; *Kilborn v. Field*, 78 Pa. 194; *Muckenburg v. Holler*, 29 Ind. 139; *Hardy v. Smith*, 136 Mass. 828; *Hamilton v. Hamilton*, 89 Ill. 349; *Comstock v. Adams*, 28 Kan. 513; *Phillips v. Thorp*, 10 Or. 494; *Cross v. Cross*, 58 N. H. 373; *Stilson v. Stilson*, 46 Conn. 15; *Sampson v. Cresson*, 6 Phila. 229; *Stoutenburg v. Lybrand*, 18 Ohio St. 223; *Daggett v. Daggett*, 5 Paige, 509, 3 L. ed. 808, 28 Am. Dec. 443; *St. John v. St. John*, 11 Ves. Jr. 586; *Com. v. Waterman*, 123 Mass. 43; *Weeks v. Hill*, 38 N. H. 199; *Everhart v. Puckett*, 78 Ind. 409; *Belden v. Munger*, 5 Minn. 211; *Noice v. Brown*, 10 Vroom. 23.

⁴*Speck v. Daneman*, 7 Mo. App. 165; *Hamilton v. Hamilton*, 89 Ill. 349.

And the case of *Shelthar v. Gregory*, 2 Wend. 432, was an action upon the bond and agreement to separate, and the defense was that after the bond was given and before the installment or sum fell due by the terms of the agreement, the wife returned to and was living with the husband, and was supported by him. In these cases, the husband and wife were living together when the agreement of articles of separation were executed, and separated immediately thereafter. The ruling of the court was to the effect that such articles of separation, considered under these various aspects, were valid. These holdings were based upon decisions made in the English courts, and neither the English nor our own courts have departed or receded from the principle thus laid down. While the husband and wife in *Calkins v. Long*, 22 Barb. 98, had actually separated before the agreement of separation was executed, the court, in holding that the agreement was valid, cites numerous decisions with approval, in England and several of the states of the Union, to the effect that such agreements are valid and will be enforced where the separation had taken place before, or takes place immediately after, the execution of the agreement of separation; and this case is said (in a note upon page 110) to have been affirmed by the Court of Appeals.

Judge Davis, in delivering the opinion of the court in *Walker v. Walker*, 76 U. S. 9 Wall. 743, 19 L. ed. 814, while regretting, upon the score of public policy, that the courts of England and of this country had gone so far, was, as was the chancellor in *Calkins v. Long*, 22 Barb. 103, constrained to hold that a covenant by the husband for the maintenance of the wife, contained in a deed of separation between them, through the medium of trustees, where the consideration is apparent, is valid, and will be enforced in equity, if it appears that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one which had already taken place. Indeed it has long since become the settled law of England, and followed in this country, that a valid agreement for an immediate separation between husband and wife, and for a separate allowance for her support, may be made through

the medium of a trustee.¹ Such agreement is not void as against public policy.²

The decision in *Holbrook v. Comstock*, 16 Gray, 109, was based upon the assumed validity of such a contract. The validity of such contracts was reluctantly conceded in *Albee v. Wyman*, 10 Gray, 222, being considered obnoxious to grave objections. That they are not illegal or against public policy, see further in *Dupre v. Rein*, 56 How. Pr. 230, 7 Abb. N. C. 258; *Mann v. Hulbert*, 38 Hun, 31; *Heyer v. Burger*, 1 Hoffm. Ch. 1, 6 L. ed. 1043; *Rogers v. Rogers*, 4 Paige, 516, 3 L. ed. 541; *Calkins v. Long*, 22 Barb. 97; *Simmons v. McElwain*, 26 Barb. 419; *Cropsey v. McKinney*, 30 Barb. 47; *Wallace v. Bassett*, 41 Barb. 92; *Anderson v. Anderson*, 1 Edw. Ch. 380, 6 L. ed. 179; *Carson v. Murray*, 3 Paige, 483, 3 L. ed. 241.

An agreement not to take legal steps to avoid a fraudulent divorce is void.³ Although in most of the states a limit is fixed within which such suits may be brought. So all proceedings in fraud of the law to secure a divorce are void.⁴

When a separation has actually taken place or been fully decided on, and articles containing suitable provisions for the wife and children are fair and equal, and not the result of fraud or coercion, no principle of public policy is disturbed, and such agreement may be sustained.⁵

¹*Loud v. Loud*, 4 Bush, 457; *Calkins v. Long*, 22 Barb. 103; *Sayles v. Sayles*, 21 N. H. 812; *Mercein v. People*, 25 Wend. 61; *Rez v. Mead*, 1 Burr. 542; *Rodney v. Chambers*, 2 East, 288; *Bettle v. Wilson*, 14 Ohio, 257; *Nurse v. Craig*, 2 Bos. & P. 148; *Todd v. Stoakes*, 1 Salk. 116; *Hindley v. Westmeath*, 6 Barn. & C. 200; *Westmeath v. Westmeath*, 1 Dow. & C. 519; *Garbut v. Bowling*, 81 Mo. 214; *Beach v. Beach*, 2 Hill, 260; *Jee v. Thurlow*, 2 Barn. & C. 547; *Scholey v. Goodman*, 1 Car. & P. 36, 1 Bing. 349; *McDownell v. Murphy*, 2 Fox & S. 279; *Nichols v. Palmer*, 5 Day, 47.

²*Fox v. Davis*, 113 Mass. 258; *Walker v. Walker*, 76 U. S. 9 Wall. 743, 19 L. ed. 814; *Hunt v. Hunt*, 4 DeG. F. & J. 221.

³*Comstock v. Adams*, 23 Kan. 518.

⁴*Eoerhart v. Puckett*, 78 Ind. 409; *Hunt v. Hunt*, 47 L. J. Mat. Cas. 22, 23; *Stilson v. Stilson*, 46 Conn. 15; *Cross v. Cross*, 58 N. H. 373; *Sloutenburg v. Lybrand*, 18 Ohio St. 228; *Phillips v. Thorp*, 10 Or. 494; *Adams v. Adams*, 25 Minn. 72; *Viser v. Bertrand*, 14 Ark. 267.

⁵*Squires v. Squires*, 58 Vt. 211; *Randall v. Randall*, 37 Mich. 572; *Compton v. Collinson*, 2 Bro. Ch. 377; *Worrall v. Jacob*, 8 Meriv. 256; *Jee v. Thurlow*, 2 Barn. & C. 547; *Jee v. Thurlow*, 4 Dow. & R. 11; *Blaker v. Cooper*, 7 Serg. & R. 500; *Hutton v. Hutton*, 3 Pa. 100; *Dillinger's App.* 35 Pa. 357; *Nichols v. Palmer*, 5 Day, 47; *Chapman v. Gray*, 8 Ga. 341; *Wells v. Stout*, 9 Cal. 494; *Gaines v. Poor*, 3 Met. (Ky.) 503; *Walker v. Walker*, 76 U. S. 9 Wall. 743, 19 L. ed. 814.

Where they had actually separated, and were living apart at the time such agreement was made, the agreement is valid.¹

A bond made to a wife's father to secure a separate maintenance for the wife, who had separated from her husband, the obligor, for their mutual comfort, to avoid the effect of jealousies and animosities that existed between them, is founded upon a legal and meritorious consideration.²

So, it has been held that a woman may maintain an action on a promissory note given to her by her former husband after divorce from him, in pursuance of a written agreement conditioned upon the divorce being decreed, the note being given and accepted in lieu of alimony.³

§ 27. Agreement for Separation and Support Supersedes Only in Part Marital Duties.—Such agreements take the place, as far as they extend, of the duties and obligations of the law in relation to husband and wife and their children. But they do not supersede or render inoperative other duties and obligations imposed by law upon husband and wife toward each other and toward their children. They are still husband and wife, but living apart from each other, and bound to observe all the other domestic duties resting upon them as husband and wife and parents, not provided for in the agreement of separation. Neither of them can marry nor commit adultery without incurring the consequences and the penalty prescribed by law to husbands and wives who commit those offenses. Hence we find numerous decisions of the courts in nearly all civilized countries holding that either husband or wife may, notwithstanding the existence of such agreement between them, maintain against the other the ordinary action for divorce, limited or absolute, according to the ground and the jurisdiction, and whether the ground therefor accrued before or after such agreement was entered into.⁴

¹ *Magee v. Magee*, 67 Barb. 100.

² *Page v. Trufant*, 2 Mass. 159; *Sumner v. Williams*, 8 Mass. 200; *Thacher v. Dinsmore*, 5 Mass. 803.

³ *Chapin v. Chapin*, 185 Mass. 398; *Bliss v. Negus*, 8 Mass. 46.

⁴ *Stewart, Mar. & Div.* § 191; *Grant v. Budd*, 30 L. T. N. S. 319; *Charlesworth v. Holt*, 43 L. J. N. S. Exch. 25; *Wright v. Miller*, 1 Sandf. Ch. 103, 7 L. ed. 256; *Carpenter v. Osborn*, 3 Cent. Rep. 804, 102 N. Y. 559; *Pettit v. Pettit*, 10 Cent. Rep. 255, 107 N. Y. 667; *Jee v. Thurlow*, 2 Barn. & C. 547; *Kremelberg v. Kremelberg*, 52 Md. 553; *Clark v. Foodick*, 6 L. R. A. 132, 118 N. Y. 7.

§ 28. **Trustee in Marital Separation not Essential, but Husband Treated as Trustee, and not Criminally Liable for Non-support.**—A valid agreement may be made for separation between husband and wife and for an allowance for her support, where the separation is inevitable and immediate, without the intervention of a trustee; and in such case the husband himself will be treated as a trustee, and a husband who enters into an agreement with his wife for a separation and an allowance for her support, where the separation is inevitable and immediate, the deed of separation providing on behalf of the wife that he shall not visit her or enter any house where she may happen to be, and shall permit her to live separate from him, and to carry on business on her own account as if she were a *feme sole*,—is not liable to a criminal prosecution instituted by the wife herself to obtain an order for her maintenance, where there is no showing that the deed was fraudulently procured, or that the terms were unreasonable, or that its execution became null and void by the acts of the parties.¹

A bond by a wife to her husband, with surety, to secure the husband against claims for her future support, executed while living apart and on settlement of a suit for separate maintenance, is not void as against public policy.²

While it is true that husband and wife cannot lawfully enter into an agreement for divorce, yet it is well settled that the amount of alimony which the husband is to pay to the wife, and the terms of the payment, and the length of time during which such payment is to continue, may be all arranged between them by consent.

In *Buck v. Buck*, 60 Ill. 242, the recitals of the decree showed that the whole question of alimony was fixed and settled by the agreement of the parties; and it was there held that it was competent for the husband to consent to the provisions of the decree, and that, having done so, he was bound by them, and could have no relief against his own voluntary agreement. Where the court has jurisdiction of the subject, the consent of the parties will authorize it to enter a valid decree or judgment in accordance

¹*Com. v. Richards*, 131 Pa. 209.

²*Winn v. Sanford*, 1 L. R. A. 512, 148 Mass. 39.

with their agreement. Where husband and wife agree upon alimony, the court will embody their agreement upon that subject in its decree.¹

§ 29. Contract Void when Immediate Separation not Contemplated.—But where the instrument, no matter what the inducing cause may have been, does not contemplate an immediate separation, it is void, as it may operate as an inducement to the separation, and therefore against the policy of the law.²

An agreement, therefore, is of no effect unless the parties are separated when the agreement is entered into, or unless they separate afterwards in pursuance of the agreement, which has not been the promotive cause.³

The validity of such agreements is recognized and enforced in numerous cases decided by the courts.⁴

§ 30. Contracts Regarding Property, but in Partial Restraint of Marriage.—Contracts concerning property, which operate in partial restraint of marriage, are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then, indeed, as a condition against public policy and the economy and morality of domestic life, it will be held utterly void.⁵ But a contract where—

¹*Stratton v. Stratton*, 77 Me. 377; *Fletcher v. Holmes*, 25 Ind. 458; *Carson v. Murray*, 3 Paige, 483, 3 L. ed. 241; *Miller v. Miller*, 64 Me. 484; *Storey v. Storey*, 1 L. R. A. 320, 125 Ill. 608, 8 Am. St. Rep. 417.

²*Gould v. Gould*, 29 How. Pr. 458, *H. v. W.* 3 Kay & J. 382; *Durant v. Titley*, 7 Price, 577; *Florentine v. Wilson*, Hill & D. 303; *Friedman v. Bierman*, 43 Hun, 390; *Morgan v. Potter*, 17 Hun, 405; *Mercein v. People*, 25 Wend. 77; *Allen v. Affleck*, 10 Daly, 512, 64 How. Pr. 381; *Nurse v. Craig*, 2 Bos. & P. 148.

³*Allen v. Affleck*, 64 How. Pr. 384, 10 Daly, 516. See *Callins v. Long*, 22 Barb. 106.

⁴*Carpenter v. Osborn*, 3 Cent. Rep. 804, 102 N. Y. 553; *Pettit v. Pettit*, 10 Cent. Rep. 255, 107 N. Y. 677; *Carson v. Murray*, 3 Paige, 483, 3 L. ed. 241; *Rogers v. Rogers*, 4 Paige, 516, 3 L. ed. 541; *Allen v. Affleck*, 64 How. Pr. 380; *Clark v. Fosdick*, 6 L. R. A. 182, 118 N. Y. 7; *Dupre v. Rein*, 56 How. Pr. 230, 7 Abb. N. C. 256; *Heyer v. Burger*, 1 Hoffm. Ch. 6, 6 L. ed. 1045.

⁵*Allen v. Jackson*, L. R. 1 Ch. Div. 399; *Jones v. Jones*, L. R. 1 Q. B. Div. 279; *Harley v. Rice*, 10 East, 22; *Crawford v. Russell*, 62 Barb. 92; *Mandlebaum v. McDonell*, 29 Mich. 78; *Key v. Bradshaw*, 2 Vern. 102; *Low v. Peers*, 4 Burr. 2235; *Sterling v. Sinnickson*, 5 N. J. L. 756; *Williams v. Cowden*, 13 Mo. 311; *Chalfant v. Payton*, 91 Ind. 202; *Bellairs v. Bellairs*, L. R. 18 Eq. 510.

by a husband agrees to pay his divorced wife a specified monthly sum for so long a time as she does not marry again and shall remain single and unmarried, is not void as in restraint of marriage.¹

A condition in a will which holds out to the legatee an inducement to live separate and apart from her husband is void as against public policy. Thus, in *Brown v. Peck*, 1 Eden, 140, the will provided that the legatee should be paid two pounds per month if she lived with her husband, but if she lived from him, and with her mother, she should be paid five pounds a month.

In *Wren v. Bradley*, 2 DeG. & S. 49, the bequest was "to my daughter, Ann Jefferies Wren, the wife of Abraham Wren, in case she shall be living apart from her said husband, the said Abraham Wren, and shall continue so to do during the lifetime of my said wife, an annuity of £30, by equal quarterly payments, the first of such payments to be made at the expiration of three calendar months next after my decease. And I do hereby further direct that, if at any time the said Ann Jefferies Wren shall cohabit with the said Abraham Wren, the said annuity hereinbefore given to her shall, during the time she shall so cohabit, absolutely cease and determine."

In *Conrad v. Long*, 33 Mich. 79, the clause of the will was as follows: "To my brother, Frederick S. Conrad, I give and bequeath the one half so remaining, and the other half I give and bequeath to my sister, Elizabeth Long, upon this condition:—if at any time subsequent she should conclude not to live with her present husband, Henry Long, as his wife. But if she continue so to live as the wife of the said Henry Long until her death, then, in that case, I give and bequeath all my property, real and personal, remaining after the burial of my mother aforesaid, to my aforesaid brother, Frederick S. Conrad."

In all of these cases the conditions quoted were very properly held to have been void. The reason is apparent. They held out a direct inducement for the legatees to live separate and apart from their husbands. The result may have been to bring about the separation and violation of their marital duties and obligations without any just cause, and in an unlawful manner. This was not

¹*Jones v. Jones*, — Colo. —, 27 Pac. Rep. 85.

so in the case of *Born v. Horstmann*, 5 L. R. A. 577, 80 Cal. 454, where it was held that a bequest to testator's daughters which provides that in case either of them shall become a widow, or otherwise become lawfully separated from her husband, she shall receive her share of the property absolutely, instead of the income, which is given to her while she remains a wife, is not void as against public policy on the ground of encouraging the daughters to live separate or be divorced from their husbands.

In that case the condition could not be complied with except by a legal separation, and for causes found by a court of justice to be sufficient. This being so, there was nothing unlawful in the condition. It is true it may be said that it would have a tendency to induce the wife to assert her legal right to a divorce and separation, and that but for such inducement such right might have been waived, but it can hardly be said that it is against public policy to attach to a legacy such a condition as will tend to induce a legatee to do a lawful act in a lawful way.

The precise question presented here has been before the Supreme Court of Vermont, in which the will provided that the legatee should have the income of the estate, and such further sums as her wants might demand, so long as she remained the wife of I. A. Thayer; but if she was "left a widow, or for any cause should cease to be the wife of said Thayer," the whole estate should be given to her. In that case the court said: "The ground upon which it is claimed that the provision of the will violates public policy is that it furnishes an inducement to the wife to become the widow of her husband, or to separate herself from him in such a manner that she would cease to be his wife. The appellants, to sustain this claim, rely upon the rule as stated in 2 Redf. Wills, 293; 1 Story, Eq. Jur. 291, and the case of *Conrad v. Long*, 33 Mich. 78.

"The cases cited in support of the rule laid down in Redfield and Story, it will be found on examination, do not sustain the rule as here sought to be applied. They are generally cases in which an inducement was directly held out to encourage a voluntary separation of husband and wife, and where the intent to encourage such a separation could be found in the language employed in making the bequest. They are none of them so sim-

ilar in their facts to the case at bar that they can be considered authorities in it. The first object is to ascertain, if possible, what the intention of the testatrix was; and we find no difficulty in reaching the conclusion that it was to have her estate disposed of just as it has been by the probate court. It was a wise and prudent provision to make for her daughter. While she should remain a wife, her husband would be under obligation to support her, and hence the income only was absolutely left her during the continuance of that relation; but when she should cease to be a wife, and so become dependent upon her own resources, it was just and wise to provide that she should have the entire estate."¹

Not only may there be a good and sufficient reason, as stated in the opinion cited, for providing that the legatee shall not have the bulk of the property until she is deprived of the support of a husband, but there may be the best of reasons for placing the same in such condition that she cannot be improperly induced by a worthless or profligate husband to squander it, while she continues to be his wife, and, it may be, under his influence and control. Such a condition in a will is not only valid, but under certain circumstances it may be just and commendable.²

¹See *Thayer v. Spear*, 1 New Eng. Rep. 356, 58 Vt. 327; *Buck v. Hughes*, 127 Ind. 46.

²*Clark v. Fredick*, 6 L. R. A. 132, 118 N. Y. 7.

CHAPTER VIII.

CONTRACTS IN RESTRAINT OF TRADE.

- § 31. *Excluding One from Pursuing His Trade or Employment.*
- 32. *Contracts in General Restraint of Trade are Void.*
- 33. *Contracts Imposing Limited Restraints Territorially as a Condition of Employment.*
- 34. *Territorial Limitations Sustained—Distance, how Determined—Instances.*
- 35. *Limit of State Lines.*
- 36. *Territorial Limitations Held too Restrictive—Instances.*
- 37. *Limitations in Regard to Time.*
- 38. *Brewers' Contracts.*
- 39. *Limitations Imposed on Seller to Protect Purchaser of Business or Stock.*
- 40. *Sale of Discovery.*
- 41. *Monopoly Secured to a Patent Right.*

§ 31. **Excluding One from Pursuing His Trade or Employment.**—The decision in *Mitchel v. Reynolds*, 1 P. Wms. 181, Smith's Leading Cases, vol. 1, pt. 11, 508, may be regarded as the first announcement of the rule in relation to the invalidity of contracts in restraint of trade. The rule was then adjusted to existing conditions and to the state of social and commercial life.

The object of government, as interpreted by the judges, was not to interfere with the free and independent right of man to dispose of his property or of his labor; it was to guard society, of which he was a member, from the injurious consequences of his agreements, whether they would arise from his own improvidence in bargaining away his means of gaining a livelihood, or in the deprivation to society of the advantages of competition in skilled labor.¹

The attempt on the part of the law was to leave the party free to contract in regard to his own labor and yet, consistent with that freedom, to prevent injurious results to the public from loss of the avails of labor, with regard to which he had contracted.

In *Bishop v. Palmer*, 6 New Eng. Rep. 129, 146 Mass. 469,

¹*Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; *Weller v. Heisee*, 10 Hun. 431; *Bishop v. Palmer*, 6 New Eng. Rep. 129, 146 Mass. 469; *Alger v. Thacher*, 19 Pick. 51.

the contract contained *inter alia*, the following provisions: "And the said party of the first part, hereby, for himself, his executors, administrators and assigns, covenant, etc., that for the period of five years he will not continue in or carry on the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which they form a part; that he will not enter into the cotton waste business in the city of Fall River, or influence others to do so, or make any bid therefor or induce others to do so." The first restriction was held clearly illegal, it being a general agreement, without any limitation of space, that during the period of five years he will not directly or indirectly continue in, carry on or engage in the business of manufacturing or dealing in certain articles of commerce.

So a contract was held void if it exclude the obligor from engaging in a useful trade as an iron founder, everywhere and for all time.¹

An agreement not to engage for eight years in the manufacture of a certain yeast powder, nor in any branch of the yeast business, is unlimited and void;² but a contract unlimited territorially, save by the words "so far as the law allows," is not void as being in conflict with public policy, nor as being too uncertain in its terms to be capable of being enforced. Such a covenant is to be construed as providing for a restraint to the full extent that the rule, as enforced by the courts, will allow a person to contract against his right of trading in a particular business, and will be given effect so as to secure to the covenantee the full benefit of that which he has purchased from the covenantor.³ Such a contract is transferable, with the assignment of the business to aid which it was made.⁴ The courts will enforce such contracts where they

¹*Alger v. Thatcher*, 19 Pick. 51, 31 Am. Dec. 119. See *Perkins v. Clay*, 54 N. H. 519; *Whitney v. Slayton*, 40 Me. 230; *Long v. Tolol*, 42 Mo. 549; *Ward v. Byrne*, 5 Mees. & W. 562; *Taylor v. Blanchard*, 13 Allen, 370; *Dean v. Emerson*, 103 Mass. 480; *Albopp v. Wheatecroft*, L. R. 15 Eq. 59; *Morse T. D. & M. Co. v. Morse*, 103 Mass. 73; *Davies v. Davies*, L. R. 36 Ch. Div. 319, 381; *Avery v. Langford*, Kay, 663, 667, 668; 2 Pars. Cont. 748, note 2; *Smith v. Western U. Teleg. Co.* 11 Fed. Rep. 10, note; *Sharp v. Whiteside*, 19 Fed. Rep. 164, note; *McCaull v. Broham*, 16 Fed. Rep. 37, 43, note; *Homer v. Ashford*, 3 Bing. 322; *Mallan v. May*, 11 Mees. & W. 658; *Mitchel v. Reynolds*, 1 P. Wins. 181.

²*Ollahan v. Donnelly*, 45 Cal. 152, 18 Am. Rep. 172.

³*Davies v. Davies*, 56 L. J. Ch. 481; 35 Week. Rep. 637.

⁴*Hedge v. Lowe*, 47 Iowa, 137; *Guerand v. Dandeleit*, 82 Md. 561; *Gompers v. Rochester*, 56 Pa. 194.

are reasonable and restrain all attempts to evade the restriction;¹ but an agreement not to sell milk in a town is not violated by selling to another residing outside the town, with knowledge merely that the purchaser intends to retail the milk within the town.²

The fact that two men had been engaged as rivals in manufacturing an article for domestic use will not prevent one of them from giving up the independent manufacture, and uniting as a partner with the other for a term of years, the price of the manufactured article being fixed in the contract of partnership.³

The withdrawal of labor from a special business within a limited locality is therefore sustained; under this theory the law of partnership exists.⁴

Trade with a newly discovered line of coast may be limited by contract to the actual business prospects for the opening of intercourse profitably.⁵

A store-keeper may contract with a manufacturer that the latter will induce his workmen to trade with the merchant, on condition of his paying the manufacturer 8 per cent on all sales to such employes;⁶ but it has been held that such a contract, by which the lessee of a coal mine, as part of the rent of the mine, contracted to use his efforts to control the patronage of his employes and their families, in favor of the lessor, and that the lessee should refuse to recognize any orders given upon him by any employe upon any other merchant for goods purchased from them, nor would he give any order, due-bill or evidence of indebtedness transferable to such other store-keeper for goods, was void as in restraint of trade, injurious to the employes and tending to extortion, oppression, and to create a monopoly.⁷

§ 32. Contracts in General Restraint of Trade are Void.—
Contracts in general restraint of trade are void, unless natural and

¹*Butler v. Burleson*, 16 Vt. 176; *Treat v. Shoninger Melodeon Co.* 35 Conn. 543; *Duffy v. Shockey*, 11 Ind. 70; *Smith v. Martin*, 80 Ind. 260; *Whitney v. Stayton*, 40 Me. 224; *Hankinson's App.* 78 Pa. 196; *Cook v. Johnson*, 47 Conn. 175; *Richardson v. Peacock*, 28 N. J. Eq. 151.

²*Smith v. Martin*, 80 Ind. 260.

³*Dolph v. Troy Laundry Mach. Co.* 28 Fed. Rep. 553.

⁴*Cooper v. Twibill*, 3 Campb. 286, note; *Catt v. Tourle*, L. R. 4 Ch. 654.

⁵*Perkins v. Lyman*, 9 Mass. 522.

⁶*George v. East Tennessee Coal Co.* 15 Lea, 455.

⁷*Crauford v. Wick*, 18 Ohio St. 190.

not unreasonable for the protection of the parties,' because they impose too great a restraint on trade and are oppressive to one party without being of benefit to the other.'

It has often been held that an agreement in general restraint of trade is illegal and void. For a contract in restraint upon trade to be valid must not be general; the consideration must be adequate, not colorable, and the restriction must be reasonable;' so an agreement in general or total restraint of trade has been held to be void without regard to the consideration upon which it is founded. Such an agreement is one not to carry on a certain business anywhere, whether for a limited or unlimited time.'

At a public auction, if the purpose be not to prevent competition, nor this result likely to follow, one may bid as the agent of others;' but if made, or if it tend to stifle competition, the act is unlawful.'

An agreement among stockholders of a corporation that they will neither of them give powers of attorney to anyone to vote their stock, nor will they sell any portion of such stock to other parties, is in restraint of trade and void.' But an agreement between a corporation and its stockholders, that the latter should

¹ *Chappel v. Brockway*, 21 Wend. 157; *Maier v. Homan*, 4 Daly, 168; *Dunlop v. Gregory*, 10 N. Y. 248; *Hodge v. Lowe*, 47 Iowa, 187, 140; *Smalley v. Greene*, 52 Iowa, 241; *Ward v. Byrne*, 5 Mees. & W. 548; *Hinde v. Gray*, 1 Man. & G. 195; *Allopp v. Wheatcroft*, 27 L. T. N. S. 872, L. R. 15 Eq. 59.

² *Heichas v. Hamilton*, 3 G. Greene, 596, 598; *Mitchel v. Reynolds*, 1 P. Wms. 184, 10 Mod. 27, 85, 180; *Hunlocks v. Blacklowe*, 2 Saund. 156, note 1; *Colmer v. Clark*, 7 Mod. 280; *Cheesman v. Nainby*, 2 Ld. Raym. 1456; *Davis v. Mason*, 5 T. R. 119.

³ *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 815; *Boutelle v. Smith*, 116 Mass. 111; *Hubbard v. Miller*, 27 Mich. 15; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 73 Mo. 389; *Sinn v. Sigbee*, 67 Ill. 75; *Bowser v. Bliss*, 7 Blackf. 844; *Holmes v. Martin*, 10 Ga. 508; *Brewer v. Marshall*, 19 N. J. Eq. 537.

⁴ *Story*, Cont. § 650; *Dean v. Emerson*, 103 Mass. 480; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 851.

⁵ *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 159; *Smith v. Ullman*, 50 Md. 188; *Hunt v. Elliott*, 80 Ind. 245; *Kearney v. Taylor*, 56 U. S. 15 How. 494, 519, 14 L. ed. 787, 787; *Woodruff v. Berry*, 40 Ark. 251; *Marie v. Garrison*, 88 N. Y. 14; *Huntington v. Bardwell*, 46 N. H. 492; *Smith v. Greenlee*, 18 N. C. 126; *Breslin v. Brown*, 24 Ohio St. 535; *James v. Fulcro*, 5 Tex. 512; *McMinn v. Phipps*, 8 Sneed, 196.

⁶ *Gibbs v. Smith*, 115 Mass. 592; *King v. Winants*, 71 N. C. 469; *Jones v. Caswell*, 8 Johns. Cas. 29; *Swan v. Chorpennig*, 20 Cal. 182; *Hannah v. Fife*, 27 Mich. 172; *Wooten v. Hinkle*, 20 Mo. 290.

⁷ *Maher v. Bush*, 35 Hun, 641.

not purchase goods of a certain class, during a limited period, of anyone other than the members of an association with which that corporation had entered into a contract, resulting in benefits to itself and members, is not in restraint of trade.¹

So agreements or conditions imposed in the conveyance of real property, restricting its use to certain purposes, or excluding certain named uses of the property, come under the same general rules and are often held invalid as without a justifiable purpose, or without sufficient consideration, or as creating and sustaining monopoly.²

A contract entered into between a baker and a grocer, for a fixed payment of money, on conditions which would naturally tend to enhance the price of the baker's bread and render it a monopoly, is void as in restraint of trade. So are all agreements to create corners in grain, produce, etc.³

A contract entered into by the grain dealers of a town, the true object of which is to form a secret combination, which would stifle all competition, control the price of grain, cost of storage and of shipment, is in restraint of trade, and void as against public policy.⁴

Where one producer enters into a contract with another producer, binding the latter to withhold and keep out of the market his supply, the contract is against public policy and void.⁵

An agreement of members of a trade protection society not to employ any commercial travelers, salesman or outside employé who had left the service of another member of the trade union, without his written consent, for the period of two years, is void.⁶

Persons controlling water powers individually in a stream cannot bind themselves in a liquidated sum as damages, not to sell to certain persons negotiating for the purchase of some of the rights, nor to make, without any limit in time, any compromise or set-

¹ *Van Marter v. Babcock*, 23 Barb. 633; *Curtis v. Gokey*, 68 N. Y. 304; *Live Stock Assn. of N. Y. v. Levy*, 8 N. Y. S. R. 514.

² *Taylor v. Blanchard*, 18 Allen, 370; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Craft v. McConoughy*, 79 Ill. 346; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Crawford v. Wick*, 18 Ohio St. 190.

³ *Raynold v. Leavitt*, 46 Mich. 447.

⁴ *Craft v. McConoughy*, 79 Ill. 346.

⁵ *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558.

⁶ *Mineral Water Bot. Ex. & Tr. Prot. Soc.* 31 Solic. Jour. 626.

tlement with such persons except on the written consent of the others. Such a contract, while it restrains the parties from compromising litigation, which is favored in law, also tends to the same evil consequences as attend the enforcement of a contract in restraint of trade;¹ but if the restraint be natural and not unreasonable for the protection of the parties it will be sustained.²

§ 33. **Contracts Imposing Limited Restraints Territorially as a Condition of Employment.**—Where the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between the parties and not specially injurious to the public, the restraint will be held valid.³ Thus a contract in restraint of trade as to a particular place is valid,⁴ such as a contract not to engage in a particular trade or business in a certain place within a specified time.⁵

A limit in space to the exercise of a trade, where there are reasons for the limit imposed, will be sustained.⁶

One may contract not to run steamboats on a particular river, as between Albany and New York.⁷

An agreement that a steamer should not be used in the waters of a State for a fixed period was held legal.⁸

¹ *Ford v. Grogson*, 7 Mont. 89; *Horner v. Ashford*, 3 Bing. 322, 336; *Mitchel v. Reynolds*, 1 P. Wms. 181; *Mallan v. May*, 11 Mees. & W. 653.

² *Leather Cloth Co. v. Lonsont*, 39 L. J. Ch. 86, L. R. 9 Eq. 345; *Smith's App.* 5 Cent. Rep. 209, 118 Pa. 579; *Mandeville v. Harman*, 5 Cent. Rep. 625, 42 N. J. Eq. 185; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 473; *Herreshoff v. Boutineau*, 8 L. R. A. 469, 17 R. I. —; *Alcock v. Gilbertson*, 5 Duer, 76; *Jones v. Lees*, 1 Hurlst. & N. 189; *Mumford v. Gething*, 7 C. B. N. S. 305; *Harmo v. Parsons*, 32 L. J. Ch. 247; *Keeler v. Taylor*, 53 Pa. 467.

³ *Hubbard v. Miller*, 27 Mich. 15, 19. See *Guerand v. Dandeleit*, 32 Md. 562; *Becl v. Chase*, 31 Mich. 490; *Ewing v. Johnson*, 34 How. Pr. 202; *Pierce v. Woodward*, 6 Pick. 206; *Hedge v. Lowe*, 47 Iowa, 187, 140.

⁴ *Chappel v. Brockway*, 21 Wend. 157; *Jenkins v. Temples*, 39 Ga. 655; *Smalley v. Greene*, 52 Iowa, 241; *Hedge v. Lowe*, 47 Iowa, 187; *Guerand v. Dandeleit*, 32 Md. 562; *Beal v. Chase*, 31 Mich. 490; *Ewing v. Johnson*, 34 How. Pr. 202; *Pierce v. Woodward*, 6 Pick. 206.

⁵ *Arnold v. Kreutzer*, 67 Iowa, 214; *Hedge v. Lowe*, 47 Iowa, 187; *Smalley v. Greene*, 52 Iowa, 241; *Baumgarten v. Broadway*, 77 N. C. 8; *Tullis v. Tullis*, 1 El. & Bl. 391.

⁶ *Smith v. Fell*, 5 Cent. Rep. 208, 118 Pa. 579.

⁷ *Dunlop v. Gregory*, 10 N. Y. 241.

⁸ *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315.

A contract restraining a party from following a particular business in a designated city for five years is held valid, as the party may pursue any other employment in the same locality.¹

An agent of a wholesale house may contract not to sell his goods to but one purchaser in the town.²

A contract by a dealer in New Jersey not to ship poultry to New York or Washington has been held not to contain an unreasonable restriction.³

An agreement not to sell marl off the vendor's land was held valid;⁴ and so of an agreement not to manufacture goods in general;⁵ so a restriction as to the use of a particular name in doing business for a period of five years is held reasonable, although the space is unlimited.⁶

A tailor may limit his sphere of business by excluding himself from a space within ten miles of Charing Cross for three years.⁷

All contracts in restraint of trade are not void; it is not against public policy for a person entering an employment to enter into a covenant restricted as to space not to carry on the same business in his own country, even if his employer should leave the business. The employer wishes to have security given to the business, not only while he is carrying it on himself, but in favor of his successors and during the whole life of the covenantor; and if reasonable when made, subsequent circumstances will not affect the operation of the contract under the rule as to contracts in restraint of trade.⁸

One who on entering a merchant's employ covenants not to engage in or carry on the same business within a mile of the shop at any future time, will be restrained from violation of his covenant, because the business was sold with its good will to another and removed to another shop, near by. The covenant was held to exist in favor of the purchaser and to bind the covenantor for his life.

¹ *Washburn v. Dosch*, 68 Wis. 436.

² *Keith v. Herschberg Optical Co.* 48 Ark. 188.

³ *Richardson v. Peacock*, 33 N. J. Eq. 597.

⁴ *Brewer v. Marshall*, 19 N. J. Eq. 537.

⁵ *Taylor v. Blanchard*, 13 Allen, 370.

⁶ *Vernon v. Hallom*, 35 Week. Rep. 156, 56 L. J. Ch. 115.

⁷ *Nicoll v. Beere*, 53 L. T. N. S. 659.

⁸ *Hare v. Whitmore*, 49 L. T. N. S. 335.

If the removal had been to a new neighborhood the result might have been otherwise. But the right of an employer to guard his business and his good will as an article of value in the market was recognized as against those he took into his employ, and thus afforded them access to his customers and information as to the details of his business.¹

A contract in restraint of trade, made on good consideration and not extending beyond the obligee's sphere of actual business, is valid.²

§ 34. Territorial Limitations Sustained—Distance, how Determined—Instances.—A contract not to carry on a trade in a particular town or county is valid.³ The question as to what is a general restraint of trade does not depend upon state lines; and a restraint is not necessarily general which embraces an entire State. Where such contract is made with the purchaser and his assigns, his successor and assignee may maintain an action upon it; and the fact that the purchaser was a foreign corporation is no objection.⁴

As to the section of the country which may be lawfully covered, the following contracts have been held valid:—not to practice medicine within 12 miles of a place;⁵ not to practice as a physician in a particular town or its vicinity. Before a covenant not to practice medicine in the neighborhood can be enforced, evidence must show the extent of the practice sold.⁶

So one may agree not to engage in the business of iron casting within 60 miles of a certain place for ten years;⁷ not to run a stage on a certain route;⁸ not to set up business of apothecary

¹ *Jacoby v. Whitmore*, 40 L. J. N. S. 885.

² *Palmer v. Stebbins*, 8 Pick. 188, 15 Am. Dec. 204.

³ *Grundy v. Edwards*, 7 J. J. Marsh. 368, 28 Am. Dec. 409.

⁴ *Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 478.

⁵ *McClurg's App.* 58 Pa. 51; *Butler v. Burleson*, 16 Vt. 176.

⁶ *Haldeman v. Simonton*, 55 Iowa, 144; *Amedon v. Gannon*, 6 Hun, 884; *Warfield v. Booth*, 83 Md. 63; *Hoyt v. Holly*, 80 Conn. 326, 12 Am. Rep. 390; *Butte v. Burleson*, 16 Vt. 176; *Smith v. Smith*, 4 Wend. 468; *Linn v. Sigsbee*, 67 Ill. 75; *Spier v. Lambdin*, 45 Ga. 319; *Mell v. Mooney*, 30 Ga. 418; *Dwight v. Hamilton*, 118 Mass. 175; *McNutt v. McEwen*, 10 Phila. 112.

⁷ *Whitney v. Slayton*, 40 Me. 224.

⁸ *Pierce v. Fuller*, 8 Mass. 223, 226.

within 20 miles of A ;' but restricting a dentist over a territory of 200 miles was held unreasonable.'

A contract, relating to a compound involving a secret in its preparation, based upon a valuable consideration, and limited as to the space within which, though unlimited as to the time for which the restraint is to operate, is reasonable and enforceable.' But restraining a solicitor from practice in England was sustained.'

A contract applying to a particular place or section of the country and leaving the major part open for the business is valid. '

A contract excluding a city and "vicinity" includes reasonably construed, a space of ten miles from the city limits ;' or within a radius of ten miles of a town named. '

Under a contract not to carry on a business within a certain distance, the mileage is to be measured in a straight line. '

A contract not to carry on a business within a radius of ten miles of a village, means within a radius of ten miles of the center of such village. '

§ 35. **Limit of State Lines.**—In this country, where state lines interpose so slight a barrier to business intercourse, the Supreme Court of the United States seems much more inclined to treat a limitation, less than the entire country, under certain conditions, as reasonable ;" while state courts, limited to their state lines, have seemed unwilling that trade should be excluded from their jurisdiction, or that a man should be compelled to transfer his residence and allegiance to another State in order to pursue his avocation."

¹ *Hayward v. Young*, 2 Chlt. 407; *Hitchcock v. Coker*, 6 Ad. & El. 498.

² *Horner v. Graves*, 7 Bing. 785.

³ *Fowle v. Park*, 181 U. S. 88, 33 L. ed. 67.

⁴ *Whittaker v. Howe*, 8 Beav. 383.

⁵ *Pike v. Thomas*, 4 Bibb, 489, 7 Am. Dec. 741; *Grundy v. Edwards*, 7 J. J. Marsh. 868, 23 Am. Dec. 409. See *Green v. Price*, 11 Mees. & W. 653.

⁶ *Timmerman v. Dever*, 52 Mich. 84.

⁷ *Cook v. Johnson*, 47 Conn. 175, 86 Am. Rep. 64.

⁸ *Mouflet v. Cole*, L. R. 7 Exch. 70, aff'd 21 Week. Rep. 175; *Duignan v. Walker*, 33 L. T. 256.

⁹ *Cook v. Johnson*, 47 Conn. 175.

¹⁰ *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315.

¹¹ *Taylor v. Blanchard*, 13 Allen, 875; *Dunlop v. Gregory*, 10 N. Y. 241; *Mors v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Nobles v. Bates*, 7 Cow. 807; *Wright v. Ryder*, 36 Cal. 342; *Pike v. Thomas*, 4 Bibb, 486, 7 Am. Dec. 741.

It is said in *Chappel v. Brockway*, 21 Wend. 157, that contracts which go to the total restraint of trade, as that a man will not pursue his occupation or carry on his trade anywhere in the State, are void. A covenant providing that the covenantor should desist from selling mattresses "in all the territory of the State of New York west of the city of Albany" was held void as embracing too large a territory.¹

It is said that the restriction territorially must not include the whole State.² But this depends upon the business restrained and its demands.³

But the correct test to be applied in determining whether a restraint is reasonable or not is to consider whether it is such only as to afford a fair protection to the interests of the party in whose favor it is given; and not so large as to interfere with the interests of the public.⁴

A covenant in restraint of trade which is unlimited in regard to space, except by the words "so far as the law allows," is not void as being against public policy.⁵

§ 36. **Territorial Limitations Held too Restrictive—Instances.**—But an agreement never to engage in a certain trade "in the city and county of San Francisco or State of California" was held by the courts in that State too extensive in its restriction and therefore void.⁶ A covenant by a corporation with a citizen of another State not to run a steamboat or allow its machinery to

¹*Lawrence v. Kidder*, 10 Barb. 641.

²*Pelts v. Eichel*, 62 Mo. 171; *Taylor v. Blanchard*, 18 Allen, 370; *Dean v. Emerson*, 102 Mass. 480; *Wright v. Ryder*, 36 Cal. 242.

³*Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 473; *Gibbs v. Consolidated Gas Co.* 180 U. S. 408, 32 L. ed. 984; *Texas & P. R. Co. v. Southern Pac. R. Co.* 41 La. Ann. 970; *Herreshoff v. Boutinseau*, 8 L. R. A. 469, 17 R. I. —.

⁴*Mandeville v. Harmon*, 5 Cent. Rep. 625, 42 N. J. Eq. 185; *Catt v. Tourle*, L. R. 4 Ch. 659; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 349; *Al'nopp v. Wheatcroft*, L. R. 15 Eq. 59; *Long v. Towl*, 42 Mo. 545; *Pike v. Thomas*, 4 Bibb, 486; *Grundy v. Edwards*, 7 J. J. Marsh. 868; *Turner v. Johnson*, 7 Dana, 436; *Grasselli v. Lowden*, 11 Ohio St. 349; *Chappel v. Brockway*, 21 Wend. 157; *Gilman v. Dwight*, 18 Gray, 356; *California Steam Nav. Co. v. Wright*, 6 Cal. 258; *Dunlop v. Gregory*, 10 N. Y. 241; *Hubbard v. Miller*, 27 Mich. 15; *Beard v. Dennis*, 6 Ind. 200; *Horner v. Graves*, 7 Bing. 748.

⁵*Davis v. Davis*, 56 L. J. Ch. 481, 35 Week. Rep. 697.

⁶*Mors v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621.

be used on any other boat in any of the waters of certain states was treated as void as against public policy.¹

A contract not to make printer's rollers in New York city, or within 250 miles thereof, is too restrictive as to space for that particular interest.² But a covenant by a corporation not to run or employ, or suffer to be run or employed, a certain steamer upon any of the routes of travel, or the rivers, bays or waters of the State of California, or the Columbia River and its tributaries, for the period of ten years, was held valid in Oregon.³

A contract excluding the territory of New York west of Albany as a market for mattresses is too large.⁴

§ 37. **Limitations in Regard to Time.**—The duration of the restraint in point of time may be indefinite, if in other respects it is partial and reasonable, the nature of the business being considered and the condition of the country.⁵

An agreement to relinquish a business and not to carry it on thereafter, limited as to place, but unlimited as to time, is not void as being in restraint of trade.⁶

An agreement that a company shall have the exclusive right for fifteen years to furnish drawing-room and sleeping cars for the use of a railroad company, and that the latter shall not, during that period, contract for cars of that kind with any other party, is not void as against public policy or as in restraint of trade.⁷

But the formation of a partnership alone will not authorize a perpetual restriction as to time.⁸

§ 38. **Brewers' Contracts.**—The sale of property may be conditioned that if a house of public entertainment be opened, its sup-

¹ *Oregon Steam Nav. Co. v. Hale*, 1 Wash. 283, 34 Am. Rep. 808.

² *Bingham v. Maigne*, 20 Jones & S. 90.

³ *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 23 L. ed. 315.

⁴ *Lawrence v. Kidder*, 10 Barb. 641.

⁵ *Bowser v. Bliss*, 7 Blackf. 344, 48 Am. Dec. 98; *Cook v. Johnson*, 47 Conn. 175; *Bunn v. Guy*, 4 East. 190; *Chesman v. Nainby*, 3 Strange, 789, 3 Ld. Raym. 1456; *Hastings v. Whitley*, 2 Exch. 611; *Wickens v. Evans*, 3 Younge & Jer. 818; *Pierce v. Woodward*, 6 Pick. 206; *Goodman v. Henderson*, 58 Ga. 587; *Mumford v. Gething*, 7 C. B. N. S. 817; *Ward v. Byrne*, 5 Mees. & W. 548.

⁶ *Webster v. Buss*, 61 N. H. 40, 60 Am. Rep. 317; *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363.

⁷ *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97.

⁸ *Carroll v. Giles*, 4 L. R. A. 154, 30 S. C. 412.

plies shall be sought exclusively from the person who executes the conveyance of the estate.

A restraint preventing a person from carrying on trade within a certain limit of space, though unlimited as to time, may be good, and the limit of space may be according to the nature of the contract. An instance of such a covenant being upheld is the case of *Wilson v. Hart*, L. R. 1 Ch. 463. In *Catt v. Tourle*, L. R. 4 Ch. 654, the court took judicial notice that the covenant is an extremely common one in favor of brewers upon a sale of land by them, that they shall have the exclusive right of supplying beer to any public house erected on the land,—that every court of justice has had occasion to consider these brewers' covenants, and must be taken to be cognizant of the distinction between what are called free public houses and brewers' public houses which are subject to this very covenant,—that it would be introducing very great uncertainty and confusion into a very large and important trade, if the court were to suggest any doubt as to the validity of a covenant so extremely common as this is. It was denied that there is any ground for the distinction, which has been suggested, that such a covenant might be good in a lease for 21, 50 or 100 years, but is not good if entered into as part of a transaction where the fee simple of property is conveyed.

It was then suggested that at some future period of the cause, upon a motion, as in the case of *Hills v. Croll*, 2 Phil. 60, or at the hearing of the cause, circumstances might be shown which would render it improper for the court to interfere—it might be shown either that the plaintiff had placed himself in such a situation that he ought not to be allowed to exercise his right, or that the defendant had no notice of the covenant when he purchased the property; and then possibly *Hills v. Croll*, 2 Phil. 60, might have some application, though it was suggested that it is very difficult to reconcile that case with *Lumley v. Wagner*, 1 DeG. M. & G. 604, which has been repeatedly followed; and if *Hills v. Croll* is to stand with that case at all, it can only be upon its particular circumstances. And Sir G. M. Giffard, L. J., added, “that, with respect to *Hills v. Croll*, that case, as was said by Lord St. Leonards, in his judgment in *Lumley v. Wagner*, 1 DeG. M. & G. 604, was decided according to its particular circumstances; that

unless it is taken as laying down that the court is to refuse to act in the negative, wherever there is a correlative obligation which it cannot enforce, it does not apply; if it is taken as going that length it is contrary to *Lumley v. Wagner*, and must be considered as overruled; and he added: "Lastly, with respect to this covenant being invalid by reason of its being in restraint of trade," it does not go beyond the ordinary brewers' covenant except in this particular, viz., that the ordinary brewers' covenant is generally between lessor and lessee or mortgagor and mortgagee, whereas the present covenant is between the vendor and purchaser of the fee; and this difference does not make the covenant void.

So an agreement by the proprietor of a public garden, in consideration of a loan, to buy all his beer of the lender, so long as he should be willing to supply the same at the fair current market price thereof, is not a restraint of trade.¹

§ 39. Limitations Imposed on Seller to Protect Purchaser of Business or Stock.—Contracts for a limited restraint are valid if entered into for good reasons such as to afford fair protection to the purchaser of a business.²

A party may legally purchase the trade and business of another for the very purpose of preventing competition, and its validity, if supported by a consideration, depends upon its reasonableness as between the parties.³

Where one partner sells his interest in the business to his copartner and agrees to retire altogether from business, the agreement binds the party selling from engaging in business, only so far as such engagement would injure the business of the party purchasing, and is not void as being in restraint of trade.⁴

But where a land agent sold his business, with an agreement not to re-engage in the business in the same place for three years,

¹*Ebling v. Bauer*, 17 Week. Dig. 497, distinguishing *Dunlop v. Gregory*, 10 N. Y. 241.

²*Chappel v. Brockway*, 21 Wend. 157; *Nobles v. Bates*, 7 Cow. 307; *Heichew v. Hamilton*, 3 G. Greene, 596, 4 G. Greene, 217; *Hodge v. Lowe*, 47 Iowa, 137; *Smalley v. Greene*, 52 Iowa, 241; *Jenkins v. Temples*, 39 Ga. 655; *Pierce v. Fuller*, 8 Mass. 223; *Pierce v. Woodward*, 6 Pick. 206; *Perkins v. Lyman*, 9 Mass. 522; *Pike v. Thomas*, 4 Bibb. 486; *Story*, Eq. Jur. § 292; 1 Add. Cont. §§ 272, 503; *Powell*, Cont. 102.

³*Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 473, 35 Hun, 421.

⁴*Boardman v. Wheeler*, 15 N. Y. Week. Dig. 325, 27 Hun, 615.

after the expiration of that time he was not debarred from soliciting the agency of the same lands he had in charge when the contract was made.¹

An agreement on the sale of a business not to keep the tools of that business nor engage in it after the date of sale, will be construed to apply only to such limits about the place where the business is located, as the business would naturally and reasonably embrace.² Nor will a court of equity decree specific performance of every contract for a breach of which there is no adequate remedy at law. It is in its discretion to grant or refuse equitable relief, although the contract has been declared valid at law. This discretion, however, is not arbitrary but reasonable.³

It seems that no contracts are void, as being in general restraint of trade, when they operate simply to prevent a party from engaging or competing in the same business.⁴

A covenant in a bill of sale of a manufactory, stock, fixtures, trademark and good will of the business of the manufacture and sale of friction matches, that the vendor, whose business was in New York, would not, for ninety-nine years, engage in such manufacture and sale except in the service of the vendee within any of the United States or territories, except Nevada and Montana, is valid; and the restraint is partial and not general.⁵

A covenant not to engage in a business in a town so long as the purchaser of the business should prosecute it there, is a valid agreement.⁶

If a contract which is only reasonable in the restrictions on the vendor is permitted, the seller is not any more likely to become a burden on the public than the man who, having built up a local trade, only sells it, binding himself not to carry in on in the locality. The opportunities for employment and for the exercise of useful talents are not so shut up and hemmed in that the public

¹*Hanna v. Andrews*, 50 Iowa, 462.

²*Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153.

³Pom. Eq. Jur. §§ 934, 1405.

⁴*Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519.

⁵*Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 473, 35 Hun, 421.

⁶*Gill v. Ferris*, 82 Mo. 156. See *Tullis v. Tullis*, 1 El. & Bl. 391.

is likely to lose a useful member of society in the one case and not in the other.

It is clear that public policy and the interests of society favor the utmost freedom of trade within the law, and require that business transactions should not be trammelled by unnecessary restrictions. If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice.¹ It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void, is founded, in part, upon the policy of preventing monopolies, which are opposed to the liberty of the subject and the granting of which by the king, under claim of royal prerogative, led to conflicts memorable in English history.

But a covenant that a person who sells the business of manufacturing a particular article will not engage in the same business excepting in the capacity of agent or employé of the one to whom he sells within any of the several states of the United States or in the territories thereof, excepting and reserving, however, the right to manufacture and sell within a designated State and a Territory, operates simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased.²

The vendor is entitled to sell to the best advantage, and in so doing to exercise his right to preclude himself from entering into competition with the one who purchases, and the purchaser is entitled to such protection as is reasonably necessary to secure the full fruit of his investment.³

To the extent that the contract prevents the vendor from carrying on a particular trade, it deprives the public of any benefit it may derive from his entering into competition; but the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such covenants do not create monopolies. They confer no

¹ *Printing & N. Reg. Co. v. Sampson*, L. R. 19 Eq. 462.

² *Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 475, 85 Hun, 431.

³ *Forole v. Park*, 181 U. S. 88, 88 L. ed. 67.

special or exclusive privileges. If contracts in general restraint of trade (where the trade is general) are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of a contractor in the particular trade or calling, and prevent his becoming a competitor with the covenantee.

The motive of the covenantee is not, by any rule of law, made the test of the validity of such a contract. On the contrary, a party may legally purchase the contract and business of another, for the very purpose of preventing competition; and the validity of the contract, if supported by a consideration, will depend upon its reasonableness, as between the parties. Combinations between producers to limit production are or may be unlawful, but they stand on a different footing.¹

But the mere purchase of the "good will" will not be construed so as to prevent the seller from carrying on the same business in the same town.² Nor will a promise by merchants or dealers, not to purchase any particular article, produced in the immediate locality, from the makers for a term of years, as a consideration to induce a firm to open a store to deal in that particular article, be sustained. In *Chaplin v. Brown* (Iowa) 12 L. R. A. 428, the appeal was by plaintiffs from a judgment of the district court in favor of defendants in an action brought to recover damages for defendants' breach of their agreement not to engage in the business of buying butter in a certain place, and to enjoin the further breach of such agreement. It appears from the petition that in the month of March, 1890, the plaintiffs entered into a written agreement with the defendants and other parties. The following is a copy of said agreement:

"We, the undersigned grocerymen of Storm Lake, finding the business of purchasing butter of farmers and handling the same very burdensome, and of material loss to us, and believing the same could be handled as advantageously by persons who would make

¹*Leatie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519; *Howle v. Park*, 181 U. S. 98, 38 L. ed. 67; *Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 478, 85 Hun, 421.

²*Porter v. Gorman*, 65 Ga. 11; *Hegeman v. Hegeman*, 8 Daly, 1.

butter buying and handling an exclusive business, and whereas, the firm of D. & E. Chaplin, through their agent, assures us of their ability to handle butter to the best advantage, and that they will engage in the business extensively in our town, we make a solemn engagement and pledge ourselves to each other and to the said firm of D. & E. Chaplin that we will buy no more butter or take no more in trade, except for our family use, and all butter so bought shall be delivered by the seller to the buyer's place of residence. This, however, shall not prevent any merchant from buying butter to retail from any regular butter buyer who buys all the butter he handles in this town for cash. It is further provided that the said firm of D. & E. Chaplin, in whose favor we abandon the business, shall open rooms conveniently located for buying butter; that they shall keep a man in attendance during all business days and hours in the year from as early in the morning and until as late in the evening as the season of the year and state of the weather might seem to require. They shall accept all the butter offered, and shall pay for the same as high price in cash, or by giving check against a suitable deposit in some bank in this town, as merchants or butter buyers in the town of Newell, this county, are at the time paying in cash for a similar grade of butter, except in extreme cases, where they may be paying materially more than the markets will warrant. It is also provided that the said D. & E. Chaplin shall not direct their checks or persons taking the same to any particular store for payment. That they shall not buy in connection with any dry goods or grocery store. Whenever a majority of the merchants signing this article of agreement are convinced that the engagements herein entered into are not being complied with, or whenever they are dissatisfied with this arrangement or the manner in which it is being carried out, any merchant whose name is hereto appended may appoint a meeting by notifying each grocery firm in town of the time and place for the purpose of considering who may be guilty of a breach of faith in carrying out these engagements, or whether it is advisable to continue the same; and if, at such meeting, a majority of the subscribers hereto shall certify in writing that they think it advisable for the interest of the town to withdraw from this engagement, this contract shall become null and

void. This engagement shall take effect and be in force from and after such time as when it shall have been subscribed to by each grocery house in this town, and when the firm of D. & E. Chaplin shall designate, provided they are then prepared to handle the butter, and shall continue two (2) years unless sooner dissolved, as herein provided. We also agree not to pay a higher price for eggs than shall be fixed by the said firm of D. & E. Chaplin, provided said firm shall fix as high price as eggs are at the time worth to ship."

It is averred in the petition that the plaintiffs, in pursuance of said written contract, came and located at Storm Lake, and engaged in the business of buying butter at that place, and were at the commencement of the suit still so engaged, and have made arrangements to continue the business for the said period of two years, and that they have thus far fully complied with said written agreement, but that the defendants, in violation thereof, have opened a butter store in said town, and have engaged in the business of buying butter generally, and have thereby interfered with plaintiffs' business, and alienated their trade to the extent of 5,000 pounds of butter, upon which plaintiffs would have realized a profit of three cents a pound, making in all \$150 damages suffered by plaintiffs. Judgment is demanded for said sum, and an injunction is prayed restraining the defendants from continuing in said business.

Among the several grounds of objection to the granting of an injunction the court considered two of them as material. They are as follows: *first*, that the agreement in writing is void for want of consideration, as there is no money value inuring to the benefit of the defendants herein; and, *second*, that said contract by its terms is for the purpose of creating a monopoly in purchasing and selling butter at Storm Lake, and is therefore in restraint of trade to the detriment of the producers and consumers of butter at that place and in that vicinity.

In passing upon these objections it is said that the history of the law upon the question of contracts in restraint of trade is an interesting subject of investigation. The books abound in cases upon the subject. Anciently all contracts were void which in any degree tended to the restraint of trade, even in a particular local-

ity, and for a limited time. This ancient rule has been so far modified that, although agreements in general restraint of trade are invalid, because they deprive the public of the services of the citizen in the occupation or calling in which he is most useful to the community, and expose the people to the evils of monopoly, and prevent competition in trade, yet an agreement in partial restraint of trade will be upheld where the restriction does not go beyond some particular locality, is founded upon a sufficient consideration, and is limited as to time, place and person. It is accordingly everywhere now held that when one engaged in any business or occupation sells out his stock in trade and good will he may make a valid contract with the purchaser binding himself not to engage in the same business in the same place for a time named, and he may be enjoined and restrained from violating his contract. This is about as far as contracts in restraint of trade have been upheld by the courts in this country or in England. The general principles above announced will be found in all text-books upon contracts, and find support in many adjudged cases.

Applying these rules to the contract under consideration, the inquiry is made first whether there is a sufficient consideration for the promise of the defendants and the other parties who executed the instrument not to engage in dealing in butter at Storm Lake. It is said that it is very plain that there was no money paid to them as a consideration. The plaintiffs did not purchase any stock of butter which the defendants had on hand. They paid nothing for an established plant or place of doing business, nor for the good will of any business. So far as appears, they went into the town and proposed to go into the butter business if the other persons then engaged in that business would agree to quit that line of trade for two years. No warrant is found by the court in any precedent for holding that this is a sufficient consideration. There are cases which hold, and the law is well settled, that where a party proposes to expend money in erecting a manufactory or other plant which may be a public benefit, subscriptions in aid of the enterprise are valid obligations. But such contracts are widely different in principle from the agreement under consideration. Suppose the plaintiffs had made a proposition to the dry-goods merchants that if they would all quit the business for two years,

without any consideration being paid to them for so doing, the plaintiffs would establish a dry-goods store at that place, and the proposition had been accepted; it would be a marvelous decision if any court would hold that there was any consideration for such a contract.

The court also declared that the decision of the district court is manifestly right upon the question that the agreement is against public policy. It plainly tends to monopolize the butter trade of that locality, and destroy competition in that business. It is not necessary that the enforcement of the agreement would actually create a monopoly in order to render it invalid, and surely, where all the dealers in a commodity in a certain locality agree to quit the business, and the plaintiffs are installed as the only dealers in that line, the tendency is, for a time at least, to destroy competition, and leave the plaintiffs as the only dealers in that species of property in that locality. It was accordingly held that such contracts could not be enforced.

Nor will a contract between a purchaser of a stock in a manufactory, with the machinery, materials, tools and good will, be sustained, where it excludes the seller from engaging in the business in an unreasonably extensive territory, and does not occupy the field itself, being a foreign corporation, and excludes the use of the premises for the same manufacturing purposes for a period of five years.¹

§ 40. **Sale of Discovery.**—One may sell a secret of a business and restrain himself generally from using or divulging it. The vendor is entitled to sell to the best advantage and in so doing to exercise the right to preclude himself from entering into competition with those who purchase the secret from him.²

A contract, by which defendants, for a valuable consideration, agreed not to sell a certain medicinal preparation, within the territory which it was covenanted complainants should occupy exclusively, nor sell to others for sale there, nor promote such sales, is valid.

¹ *Western Wooden Ware Assn. v. Starkey*, 11 L. R. A. 508, 84 Mich. 76.

² *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Jarvis v. Peck*, 10 Paige, 118, 4 L. ed. 910; *Hard v. Seeley*, 47 Barb. 428; *Alcock v. Gibertson*, 5 Duer, 79; *Vickery v. Welch*, 19 Pick. 528.

Such a contract, relating to a compound involving a secret in its preparation, based upon a valuable consideration, and limited as to the space within which, though unlimited as to the time for which the restraint is to operate, is reasonable and enforceable.

Where one has and transfers property in the secret process of manufacturing an article he has discovered, he and his grantees can claim relief as against breaches of trust in respect to it.

The policy of the law is to encourage useful discoveries by securing their fruits to those who make them.

A contract in regard to the manner in which the parties shall exercise their alleged patent-rights, under which they make conflicting claims, and which contract has reference merely to the manufacture of goods under the specified patents,—is not void because in restriction of trade.¹

An agreement authorized by each member of an association, by which an owner of a patented process is to confine the sale and use thereof to the members of the association, each of which is to pay a percentage on the manufactured articles, no member being responsible for anything but his own work, and there being no community of profits and losses,—is not a contract in restraint of trade, although there is no agreement on the part of any of the members to use the machinery at all, or as to the amount of the articles they will offer for sale.²

The public are only interested in securing the preparation and not in the vendors, and the latter is entitled to exclude competition from his grantor or from those to whom he may sell within a reasonable territory unless they intend indeed to occupy the entire field.³

The contract does not deprive the public of the benefit of this secret nor is any party, possessing the secret, debarred from its use. They are simply circumscribed as to the territory within which they may sell.⁴

¹*Bowling v. Taylor*, 40 Fed. Rep. 404.

²*Good v. Daland*, 121 N. Y. 1.

³*Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67.

⁴*Benwell v. Inns*, 24 Beav. 307; *Harms v. Parsons*, 33 Beav. 328; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Rannie v. Irvine*, 7 Man. & G. 969; *Jones v. Lees*, 1 Hurlst. & N. 189; *Alsom v. Wheatcroft*, L. R. 15 Eq. 59; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351.

§ 41. **Monopoly Secured to a Patent Right.**—A limited monopoly secured by a patent granted for a new discovery or invention is an admitted exception to the general rule against monopolies, for this is the only way the inventor can be paid and it is adopted as a matter of public policy to encourage discovery.

A contract not to aid, assist or encourage, in any manner, competition against purchasers of patents of twists, drills and collets, was held valid in a suit to restrain defendants from violating it by making the articles in another State and selling them in the restricted market. As the business was not local the restraint was regarded as only reasonable protection.¹

A contract between an individual and three manufacturers under several patents forming a combination of the parties, with a view to regulate competition between the parties to it in the sale of the particular commodity which they severally make, is a contract for a lawful purpose where it does not refer to an article of prime necessity, to a staple of commerce, or to a merchandise to be bought or sold on the market.²

In *Jones v. Lees*, 1 Hurlst. & N. 189, a covenant by the defendant, a licensee under a patent, that he would not, during the license, make or sell any slubbing machines unless the invention of the plaintiff applied to them, was held valid. A contract for the exclusive right to supply a certain district with flour prepared under a certain patent, for a royalty, is not invalid.³

An assignment of the sole right to make, use and vend a certain patented article for a certain time "within the southern half of Alabama, less Chambers County," is not void for uncertainty as to the territory.⁴

But contracts between holders of patents are often sustained upon the ground that the contract is reasonable in itself, leaving out of view the question of monopoly rightly yielded to a patent invention. In a case decided in Massachusetts June 25, 1891,⁵ the plaintiff and defendant corporations, which had been engaged in litigation with each other as to the alleged infringement of a

¹ *Morse T. D. & M. Co. v. Morse*, 103 Mass. 78, 4 Am. Rep. 513.

² *Central Shade Roller Co. v. Oushman*, 3 New Eng. Rep. 505, 143 Mass. 363.

³ *Hecker v. Fowler*, 69 U. S. 2 Wall. 123, 17 L. ed. 759.

⁴ *Dudley v. Suddoth*, — Ala. —, 8 So. Rep. 873.

⁵ *Gloucester Isinglass & G. Co. v. Russia Cement Co.* (Mass.) 12 L. R. A. 563.

patent owned by the plaintiff, believing that they would be able to practically control the profitable manufacture of fish glue, entered into a contract with each other by which the defendant was to pay a certain sum for damages and one half of the costs of the suits, and to be allowed the use of the patent. Each party was to conduct its own establishment and they were to unite in the purchase of fish skins, an article of which the supply was limited and from which the fish glue is manufactured, so that there should be no competition between them. The plaintiff was to fix the price of all skins purchased, the parties were to have certain places assigned to them by two persons named, of which they were respectively to have the product; from the proprietors of certain other places mentioned the defendant was to have the entire product and to allow the plaintiff to receive from it one third thereof, and the two parties were to divide equally between them the skins which might be obtained from new producers. They were both to sell the glue at the same price, to be agreed upon from time to time, and the contract contained other stipulations, the effect of which was to prevent competition between them. The contract was made in February, 1884. After they had conducted the business in this manner until early in 1887, it became evident to both that the patent was invalid, although no formal judgment was rendered declaring it so. Thereupon, Mr. Brooks, the manager of the defendant company, made a large number of what are known as the long term contracts for the purchase of all skins to be produced until the year 1900, with nearly all the producers of fish skins known to the parties. The plaintiff received its share of these skins and no difficulty arose between the two companies, until early in July, 1890, when the defendant notified the producers of skins by whom the plaintiff had been supplied up to that time not to deliver it any more skins, and notified the plaintiff of its abandonment of the contract. Until then the parties had gone along under the contract as modified by mutual consent, and no intimation had been given the plaintiff of any intention to abandon it. The object of the bill is to compel the defendant to permit the plaintiff to obtain directly from the producers, or through the defendant, what it deems its share of the fish skins. The defendant contends that the contract as originally made was void as contrary to public policy.

But in considering this contention the court says that the original purpose of the contract was to regulate the business of manufacturing a product under what was supposed to be a new invention on which letters patent of the United States had been issued, whereby an article then nearly worthless might be converted into an article of large value. The use to which the fish skins were put under this invention gave them their market value. The plaintiff and defendant sought to unite with each other in the purchase of the raw material, so that they might not be tempted to overbid each other and thus to raise it to an unreasonable price, and also to agree on the price at which the manufactured article should be sold so that they might be secure in a reasonable profit. Even if they hoped for gain by their joint exertions or by the possession of a patent as to the value of which they were subsequently disappointed, their contract had no relation to an article of prime necessity, or to staple commodities ordinarily bought and sold in the market, but to a particular article of which both were manufacturers under the same process, and to an article used in the manufacture which was of little value for any other use; that the agreement was not obnoxious to the objection made by the defendant is shown by the case of *Central Shade Roller Co. v. Cushman*, 3 New Eng. Rep. 505, 143 Mass. 353.

In *Central Shade Roller Co. v. Cushman*, 3 New Eng. Rep. 505, 143 Mass. 353, the contract which is sought to be enforced was made between the plaintiff of the first part and three manufacturers under several patents of certain curtain fixtures known as "wood balance shade rollers" of the second part, in pursuance of an arrangement between the persons forming the party of the second part, that the plaintiff corporation should be created for the purpose of becoming a party to the combination, and purposed to prevent, or rather to regulate, competition between the parties to it in the sale of the particular commodity which they made.

It was held that this is a lawful purpose, but it is argued that the means employed to carry it out—the creation of the plaintiff corporation and the terms of the contract with it—are against public policy, and invalid.

But the fact that the parties to the combination formed themselves into a corporation of which they were the stockholders, that

they might contract with it instead of with each other, and carry out their scheme through its agency instead of that of a pre-existing person, it is said is obviously immaterial, and the only ground upon which it can be argued that the contract is invalid is the restraint it puts upon the parties to it.

The court then inquires whether the contract imposes a restraint as to the manufacture or the sale of balance shade rollers, which is void as against public policy, and concludes that the contract certainly puts no restraint upon the production of the commodity to which it relates. It puts no obligation upon and offers no inducement to any person to produce less than to the full extent of his capacity. On the contrary, its apparent purpose is, by making prices more uniform and regular, to stimulate and increase production. The contract does not restrict the sale of the commodity. It does not look toward withholding a supply from the market, in order to enhance the price, as in *Craft v. McConoughy*, 79 Ill. 346, and other cases to the same effect. On the contrary, the contract intends that the parties shall make sales, and gives them full power to do so, the only restrictions being that sales, not at retail or for export, shall be in the name of the plaintiff and reported to it, and the accounts of them kept by it, and the provision that when any party shall establish an agency in any city or town for the sale of a roller made exclusively for that purpose, no other party shall take orders for the same roller in the same place. To these restrictions, clearly valid, there is added the one which affords an argument for the invalidity of the contract—the restriction as to price. That restriction is, in substance, that the price for rollers of the same grade, made by different parties, shall be the same, and shall be according to a schedule contained in the contract, subject to changes which may be made by the plaintiff upon recommendation of three fourths of its stockholders. This the court regards as in effect an agreement between three makers of a commodity that for three years they will sell it at a uniform price, fixed at the outset, and to be changed only by consent of a majority of them. The agreement does not refer to an article of prime necessity, nor to a staple of commerce, nor to merchandise to be bought and sold in the market, but to a particular curtain fixture of the parties' own manufacture. It does

not look to affecting competition from outside (the parties have a monopoly by their patents), but only to restrict competition in price between themselves. Even if such an agreement tends to raise the price of the commodity it is one which the parties have a right to make. To hold otherwise would be to impair the right of persons to make contracts and to put a price on the products of their own industry. But, it is said, we cannot assume that the purpose and effect of the combination is to unduly raise the price of the commodity. A natural purpose and a natural effect is to maintain a fair and uniform price, and to prevent the injurious effects, both to producers and consumers, of fluctuating prices caused by undue competition. When it appears that the combination is used to the public detriment, a different question will be presented. The contract is apparently beneficial to the parties to the combination, and not necessarily injurious to the public, and it is denied that there is any authority or reason for holding it to be invalid as a restraint of trade or against public policy.

CHAPTER IX.

MODIFICATIONS OF THE RULE AS TO CONTRACTS IN RESTRAINT OF TRADE.

- § 42. *Mitchel v. Reynolds*—Act of Parliament in 1844, *Repealing Statutes Regarding Trade*.
- 43. *Modern Doctrine that Restraint is Valid, if Co-extensive only with Interest to be Protected and with Benefit Meant to be Conferred*.
- 44. *Public Policy Concerning Trade Restrictions*.
- 45. *Examples of Modern Rule Regarding Restrictions*.
- 46. *Legality of Consideration, and Reasonableness of Restriction, Questions of Law*.
- 47. *Presumption as to Legality of Contracts in Partial Restraint of Trade*.
- 48. *Contract in Restraint of Trade Legal in Part and Severable*.
- 49. *Partial Restriction of Trade not Permissible by Corporations*.

§ 42. **Mitchel v. Reynolds**—Act of Parliament in 1844 **Repealing Statutes Regarding Trade**.—As the rule announced in *Mitchel v. Reynolds*, 1 P. Wms. 181, was intended to apply to then present conditions of commercial and social life, it of necessity must change with altering circumstances and conditions, and the inclination of modern thought and of the decisions, has been no longer to uphold in its strictness the doctrine which formerly prevailed in respect of agreements in restraint of trade. The severity with which such agreements were at first treated became more and more relaxed by exceptions and qualifications. This change was gradual and may be considered, perhaps, as due mainly to and as keeping even pace with the growth and spread of the industrial activities of the world and enlarged commercial facilities, which render such agreements less dangerous as tending to create monopolies. The earlier doctrine, of course, obtained in respect of agreements between individuals. The limitation which became imposed was that the agreement should operate as to a locality, and not as to the whole land. In later times the extreme

danger in such agreements seems only necessarily to exist when corporations are parties to them; for their means and strength would usually better enable them to buy off rivalry and to create monopolies.

In 1844, a statute was passed in Parliament which removed many of the cumbersome provisions regarding contracts supposed to be restrictive of trade. The Act was as follows:

"An Act for Abolishing the Offenses of Forestalling, Regrating, and Engrossing, and for Repealing Certain Statutes Passed in Restraint of Trade.

"Whereas divers statutes have been from time to time made in the parliaments of England, Scotland, Great Britain and Ireland respectively prohibiting certain dealings in wares, victuals, merchandise, and various commodities by the names of badgering, forestalling, regrating, and engrossing, and subjecting to divers punishments, penalties, and forfeitures, persons so dealing; and

"Whereas it is expedient that such statutes, as well as certain other statutes made in hindrance and in restraint of trade, be repealed; and

"Whereas an Act of the Parliament of Great Britain was passed in the twelfth year of the reign of King George the Third, intitled 'An Act for repealing several laws therein mentioned against badgers, engrossers, forestallers and regraters, and for indemnifying persons against prosecutions for offenses committed against the said acts,' whereby after reciting that it had been found by experience that the restraint laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, have a tendency to discourage the growth and to enhance the price of the same, which statutes, if put in execution, would bring great distress upon the inhabitants of many parts of this kingdom, and in particular upon those of the cities of London and Westminster, sundry acts therein mentioned, and all the acts made for the better enforcement of the same, were repealed, as being detrimental to the supply of the laboring and manufacturing poor of this kingdom; and

"Whereas, notwithstanding the making of the first recited Act, persons are still liable to be prosecuted for badgering, engrossing,

forestalling, and regrating, as being offenses at common law, and also forbidden by divers statutes made before the earliest of the statutes thereby repealed: For remedy thereof, and for the extension of the same remedy to Scotland and to Ireland, be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That after the passing of this Act the several offenses of badgering, engrossing, forestalling, and regrating be utterly taken away and abolished, and that no information, indictment, suit or prosecution shall lie either at common law or by virtue of any statute, or be commenced or prosecuted against any person for or by reason of any of the said offenses or supposed offenses.

"II. And be it enacted, That the several acts and parts of acts made in the Parliaments of England and Scotland, Great Britain and Ireland, hereinafter mentioned, shall be repealed, but not so as to revive any Act repealed by any of the acts hereby repealed; (that is to say,)

"The following acts and parts of acts of the Parliament of England, to wit:

"So much of an Act passed in the fifty-first year of the reign of King Henry the Third, intituled 'A Statute of the pillory and tumbrel; and of the assize of bread and ale,' as is now in force:

"So much of an Act passed in the 12th year of the reign of King Edward the Second, intituled 'No officer of a city or borough shall sell wine or victual during his office,' as now in force:

"So much of an Act passed in the reign of King Henry the Third, King Henry the First, or King Edward the Second, intituled 'The punishment of a butcher selling unwholesome flesh,' as provides punishment for a butcher or cook that buyeth flesh of Jews and selleth the same unto Christians:

"The whole of an Act passed in one of the three last mentioned reigns intituled 'No forestaller shall be suffered to dwell in any town:'

"The whole of an Act passed in the 23d year of the reign of King Edward the Third, intituled 'Victuals shall be sold at reasonable prices:'

"The whole of an Act passed in the 25th year of the same reign intituled 'The penalty of him that doth forestall wares, merchandise, or victual.'

"So much of an Act passed in the 27th of the same reign intituled 'A statute of provisors,' as provides that commissions shall be granted to inquire of offenders contrary to the Statute of 23 Edw., 3, chap. 6, and enacts, 'The penalty for forestalling of merchandises, before they come to the staple:'

"The whole of two acts passed in the 31st year of the same reign, respectively entitled 'The statute of herrings,' and another statute of salt fish:

"The whole of an Act passed in the 35th year of the same reign, entitled 'An ordinance of herring:'

"So much of an Act passed in the 37th year of the same reign, intituled 'Merchants shall not engross merchandises to enhance the prices of them, nor use but one sort of merchandise,' as is now in force:

"The whole of an Act passed in the same year, intituled 'Clothiers shall make cloths sufficient for the foresaid prices,' so that this statute for default of such cloths be in no wise infringed:

"The whole of an Act passed in the second year of the reign of King Richard the Second, intituled 'A confirmation of the statutes of 25 Edw. III., Stat. 4, chap. 3, against forestallers:'

"So much of an Act passed in the 13th year of the same reign, intituled 'The rates of laborers' wages shall be assessed and proclaimed by the justices of the peace, and they shall assess the gains of victuallers; who shall make home-made bread, and the weight and price thereof,' as is now in force:

"So much of an Act passed in the 4th year of the reign of King Henry the Fourth, intituled 'An hostler shall not make horsebread; how much he may take for oats,' as is now in force:

"So much of an Act passed in the 25th year of the reign of King Henry the Eighth, intituled 'Proclamations for the prices of victuals, namely, the pricing of them and proclaiming the prices,' as is now in force:

"So much of an Act passed in the 28th year of the same reign, intituled 'For prices of wine,' as is now in force, not relating to the gauging and measuring of wine, oils, honey, or other liquors or things:

"So much of two acts passed in the session of Parliament holden in the third and fourth years of the reign of King Edward the Sixth, respectively, intituled 'An Act for buying and selling of rother beasts and cattle,' and 'An Act for the buying and selling of butter and cheese,' as is now in force:

"The whole of an Act passed in the session of Parliament holden in the fifth an sixth years of the same reign, intituled 'An Act against regraters and ingrossers of tanned leather,' except the prohibition of currying or dressing tanned leather within the city of London and the suburbs thereof, as provided by the last mentioned Act:

"Also the following acts of the Parliament of Scotland, to wit:

"An Act passed in the year one thousand five hundred and three, intituled 'Of malt makaris in burrow towns:'

"An Act passed in the year one thousand five hundred and thirty-five, intituled 'Off Forstallaris:'

"An Act passed in the year one thousand five hundred and forty, intituled 'For eschewing of derth, wittalia, flesche, and fysche:'

"Also an Act of the same year, intituled 'For stanching of derth and prices of wyne, salt, an tymmer:'

"Also an Act of the same year, intituled 'Anentis forstallaris:'

"An Act passed in the year one thousand five hundred and fifty-five, intituled 'Anent the disposition of wyne, salt, and tymmer brocht into the realme:'

"An Act passed in the year one thousand five hundred and seventy-nine, intituled 'For punishment of regrataris and forstallaris:'

"An Act passed in the year one thousand five hundred and ninety-two, intituled 'Aganis foirstallaris and regraitaris:'

"An Act passed in the year one thousand six hundred and sixty-one, intituled 'An Act for erecting of manufactories:'

"Also the following acts and parts of acts of the Parliament of Ireland, to wit: The whole of an Act passed in the fourth year of the reign of King Edward the Fourth, intituled 'An Act against engrossers and regraters of corn:'

"The whole of an Act passed in the thirty-third year of the reign of King Henry the Eighth, intituled an 'Act for grey merchants,' as revived and perpetuated by a subsequent Act passed in the

eleventh year in the reign of Queen Elizabeth intituled 'An Act for reviving the statute against grey merchants,' the statute for servants' wages and the Statute of Jeofails;

"So much of an Act passed in the second year of the reign of Queen Anne, intituled 'An Act to prohibit butchers from being grazers,' and to redress several abuses in buying and selling of cattle, which Act is perpetuated by another Act made in the ninth year of the reign of Queen Anne, as prohibits any butcher from being a grazier, or keeping in his possession, or in trust for him, above 20 acres of land, or from selling any cattle to any other butcher in Dublin, or within 5 miles thereof, or from keeping at hay or feed oxen or other cattle for above ten day, or from exposing for sale any oxen or other cattle within 20 miles of the place where bought, and which prohibits any person from selling or exposing for sale any cattle or sheep on the same day when bought;

"So much of an Act passed in the tenth year of the reign of King George the First, intituled 'An Act for regulating abuses committed in buying and selling cattle and sheep in the several markets of this kingdom,' as prohibits cattle from being bought within six miles of any market;

"The whole of an Act passed in the fifteenth year of the reign of King George the Second, intituled 'An Act to explain and amend a clause in an Act passed in the second year of the reign of Queen Anne intituled, An Act to prohibit butchers from being graziers, and to redress several abuses in buying and selling of cattle, and in slaughtering, and packing of beef, tallow, and hides;'

"The whole of an Act passed in the thirty-first year of the reign of King George the Second, intituled 'An Act to prohibit salesmen from being grazers,' and to redress several abuses in buying and selling cattle or meat;

"So much of an Act passed in the session of Parliament holden in the thirteenth and fourteenth years of the reign of King George the Third, intituled 'An Act for paving streets within the city and county of the city of Dublin,' as authorizes a market jury to seize provisions or victuals in the hands of any forestaller, regrater, or engrosser;

"So much of an Act passed in the twenty-seventh year of the reign of King George the Third, intituled 'An Act for establishing

market juries in cities,' as authorizes and empowers certain market juries to seize provisions or victuals found in the hands of fore-stallers, regraters, and engrossers;

"III. And be it enacted, That the several acts and parts of acts which were repealed, as to Great Britain, by the first recited Act of the twelfth year of the reign of King George the Third, shall be taken, after the passing of this Act, to be repealed as to the United Kingdom of Great Britain and Ireland.

"IV. Provided, always, and be it enacted, That nothing in this Act contained shall be construed to apply to the offense of knowingly and fraudulently spreading or conspiring to spread any false rumor, with intent to enhance or decri the price of any goods or merchandise, or to the offense of preventing or endeavoring to prevent by force or threats any goods, wares, or merchandise being brought to any fair or market, but that every such offense may be inquired of, tried, and punished as if this Act had not been made.

"V. And be it enacted, That this Act may be amended or repealed by any Act to be passed in this session of Parliament."

§ 43. Modern Doctrine that Restraint is Valid, if Co-extensive only with Interest to be Protected and with Benefit Meant to be Conferred.—The tendency of recent adjudications is to conform to the spirit which induced such modified legislation and it is now clearly marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances. Indeed, it has of late been denied that a hard and unjust rule of that kind has ever been the law of England.¹

The law has for centuries permitted contracts in restraint of trade when reasonable, and in *Horner v. Crafts*, 7 Bing. 735, Tindal, *Ch. J.*, considered a true test to be, whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so advantageous as to interfere with the interest of the public. When the restraint is general, but at the same time is co-extensive only with the interest to be protected and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the

¹*Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351.

contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint. There is no public reason which necessarily condemns the one and not the other.¹

The doctrine relating to contracts in restraint of trade has been elaborately discussed in a careful opinion of Andrews, *J.*, in the recent case of *Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 473. Under the authority of that case it may be said that no contracts are void as being in general restraint of trade where they operate simply to prevent a party from engaging or competing in the same business. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privileges.

A contract in restraint of trade, made on good consideration and not extending beyond the obligee's sphere of actual business, is valid.²

A covenant in restraint of trade is valid if it imposes no restriction upon one party which is not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into it, or, in other words, if it was a proper and useful contract, or such as could not be disregarded without injury to a fair contractor.³

This is the doctrine of *Chappel v. Brockway*, 21 Wend. 157, derived from the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181, and an examination of subsequent decisions. It is also amplified and discussed in *Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 473.

It is an encouragement to industry and enterprise in building up a trade, that a man may thereafter be permitted to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a con-

¹*Lestie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519.

²*Palmer v. Stebbins*, 8 Pick. 188, 15 Am. Dec. 204; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 515.

³*Hodge v. Sloan*, 9 Cent. Rep. 870, 107 N. Y. 249.

tenant, public policy does not forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells.

Contracts in restraint of trade will be valid, when the restriction is not larger and wider than the protection of the party with whom the contract is made can possibly require.¹

It has been said that all the cases when they come to be examined seem to establish this principle: that all restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties dealing legally with some subject matter of contract. The principle is that public policy requires that every man should not be at liberty to deprive himself, or the public, of his labor, skill or talent, by any contract that he enters into. On the other hand, public policy recognizes that when a man has by skill, or by any other means, obtained something which he wants to sell, he should be at perfect liberty to sell it to the greatest advantage to himself, and in order to enable him to effect such sale, and secure the full value, it may be, in the particular case, with regard to the subject matter, necessary that he should be able to preclude himself from entering into competition with the purchaser. In such case the same public policy enables him to enter into any stipulation, however restrictive it is, provided the restriction, in the judgment of the court, is not unreasonable, having regard to the subject matter of the contract and trade conditions.²

¹*Guerard v. Dandelot*, 32 Md. 561, 570; *Booth v. Robinson*, 55 Md. 419; *Tonawanda Valley & C. R. Co. v. New York, L. E. & W. R. Co.* 42 Hun, 496, 499; *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519, 532-534; *Dubuque & S. O. R. Co. v. Richmond*, 86 U. S. 19 Wall. 584, 590, 22 L. ed. 173, 176; *Central Shade Roller Co. v. Cushman*, 8 New Eng. Rep. 505, 143 Mass. 353, 363; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; *Columbus, P. & I. R. Co. v. Indianapolis & B. R. Co.* 5 McLean, 450-454; *Androscoggin & K. R. Co. v. Androscoggin R. Co.* 53 Me. 417, 434; *Greenhood*, Public Policy, 324, Rule 270.

²*Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; *Smith v. Fell*, 5 Cent. Rep. 208, 113 Pa. 579; *Horner v. Graves*, 7 Bing. 743; *Stearns v. Barrett*, 1 Pick. 443; *Ward v. Byrne*, 5 Mees. & W. 548; *Hitchcock v. Coker*, 6 Ad. & El. 488, 454; *Whittaker v. Howe*, 3 Beav. 388; *Mallan v. May*, 11 Mees. & W. 653, 667; *Jarvis v. Peck*, 10 Paige, 118, 4 L. ed. 910; *Alcock v. Gilbertson*, 5 Duer, 76; *Jones v. Lees*, 1 Hurlst. & N. 189; *Mumford v. Gething*, 7 C. B. N. S. 805; *Harms v. Parsons*, 32 L. J. Ch. 247; *Keeler v. Taylor*, 53 Pa. 467; *Smith v. Fell*, 5 Cent. Rep. 208, 113 Pa. 579; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 473; *Newell v. Meyendorff*, 9 Mont. 254; *Mandeville v. Harman*, 5 Cent. Rep. 625, 42 N. J. Eq. 185.

A contract restraining one competent to instruct in the German and French language, for a year after his employment ends, within the limit of a State, is unreasonable, as beyond any apparently necessary protection to his employer, unless it be shown otherwise.¹

§ 44. **Public Policy Concerning Trade Restrictions.**—Indeed what public policy requires is often vague and difficult to determine. The recognition of public policy, independently of statutory regulation, as a test of the validity of contracts, is, at best, the establishment of a very uncertain rule,² and the test of public policy is to be applied with the greatest caution.³

Public policy is in its nature so uncertain and fluctuating—varying with the habits and fashions of the day, with the growth of commerce and the usages of trade—that it is difficult to detect its limits with any degree of exactness. It has never been defined by the courts but has been left loose and free from definition in the same manner as fraud. This rule may however be safely laid down that, wherever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void, as being against public policy. The immediate representatives of the people in Legislature assembled would seem to be the fairest exponent of what public policy requires, as being most familiar with the habits and fashions of the day and with the actual condition of commerce and trade, and their consequent wants and weaknesses. Legislation is least objectionable because it operates prospectively as a guide to future transactions, and does not, like the judgment of a court, annul a contract already concluded.

¹*Herreshoff v. Boutineau*, 8 L. R. A. 469, 17 R. I. —.

²*Richardson v. Mellish*, 2 Bing. 229, 252; *Davies v. Davies*, L. R. 86 Ch. Div. 359, 364; *Sadlier v. Biggs*, 4 H. L. Cas. 437-439; *Hilton v. Eckersley*, 6 El. & Bl. 47, 64; *Printing & N. Reg. Co. v. Sampson*, L. R. 19 Eq. 465; *Re Trust Estate of Woods*, 52 Md. 520, 536; *Vidal v. Girard*, 43 U. S. 2 How. 197, 198, 11 L. ed. 204; *Richmond v. Dubuque & S. O. R. Co.* 26 Iowa, 191, 202; *Swann v. Swann*, 21 Fed. Rep. 299, 301; *Tindal, C. J.*, in *Walsh v. Fussell*, 6 Bing. 163; *Greenhood*, Public Policy, Rule 129, pp. 116, 117, and cases in notes; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 815; *Baines v. Geary*, L. R. 35 Ch. Div. 156; *Hobbs v. McLean*, 117 U. S. 569, 576, 29 L. ed. 941, 943; *U. S. v. Central Pac. R. Co.* 118 U. S. 235-240, 30 L. ed. 173-175.

³*Richardson v. Mellish*, 2 Bing. 229.

What is injurious to the rights of citizens should, it would seem, be the subject of positive legislation, rather than the doubtful judgment of a court.¹

For this reason courts are reluctant to extend the prohibitions of the common law, except where the public interest imperatively requires it.²

In all cases where the legislative judgment has been expressed, courts are bound by the policy thus declared. Where the statute declares that no one shall vote at a stockholders' meeting upon a power of attorney not executed within the year previous to the meeting, the statute discloses that the policy of the State is opposed to a surrender of the voting power by stockholders, for an indefinite period or for a term of five years, and a voting trust for such a time was therefore held illegal.³

§ 45. **Examples of Modern Rule Regarding Restrictions.**—That the general tendency of recent judicial opinion is to limit the application of the rule that contracts in restraint of trade are void, is shown by the many authorities.⁴

In *Whittaker v. Howe*, 3 Beav. 333, a contract made by a solicitor, not to practice as a solicitor in any part of Great Britain, was held valid.

A union formed among dealers in tobacco, the purpose and result of which is to arbitrarily fix the price, and destroy individual discretion, is illegal as an effort to strangle competition outright and breed monopolies.⁵

¹ *Guillander v. Howell*, 85 N. Y. 657; Story, Conf. L. § 566; *McNamara v. Gargett*, 12 West. Rep. 650, 68 Mich. 454.

² See section 10, chap. 10.

³ *Starbuck v. Mercantile Trust Co.* (Conn.) 9 Ry. & Corp. L. J. 203.

⁴ *Whittaker v. Howe*, 3 Beav. 333; *Jones v. Lees*, 1 Hurlst. & N. 189; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 23 L. ed. 315; *Morse T. D. & M. Co. v. Morse*, 108 Mass. 78; *Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 478; *Brewer v. Marshall*, 19 N. J. Eq. 537; *Taylor v. Blanchard*, 13 Allen, 370; *Vernon v. Hallam*, 35 Week. Rep. 156, 56 L. J. Ch. 115; *Perkins v. Lyman*, 9 Mass. 522; *Smith's App.* 5 Cent. Rep. 209, 118 Pa. 579; *Washburn v. Dorsch*, 68 Wis. 436; *Hanna v. Andrews*, 50 Iowa, 462; *Live Stock Assn. v. Lery*, 3 N. Y. S. R. 514; *Smith v. Martin*, 80 Ind. 280; *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519.

⁵ *Hoffman v. Brooks*, 11 Week. L. Bul. 358.

In *Rousillon v. Rousillon* a general contract not to engage in the sale of champagne, without limit as to space, was enforced, as being, under the circumstances, a reasonable contract.

In *Jones v. Lees*, 1 Hurlst. & N. 189, a covenant by the defendant, a licensee under a patent, that he would not, during the license, make or sell any slubbing machines, without the invention of the plaintiff applied to them, was held valid. Bramwell, *J.*, said: "It is objected that the restraint extends to all England, but so does the privilege."

An agreement between a corporation and its stockholders, that the latter should not purchase goods of a certain class, during a limited period, of anyone other than the members of an association with which that corporation had entered into a contract, resulting in benefits to itself and members, is not in restraint of trade.¹

The question as to what is a general restraint of trade is not to be determined by the fact that it includes all the territory within state lines; and a restraint is not necessarily general which embraces an entire State. Where such contract is made with the purchaser and his assigns, his successor and assignee may maintain an action upon it; and the fact that the purchaser was a foreign corporation is no objection. And the use of a name may be controlled.²

Thus a covenant not to carry on the business of a manufacturer anywhere for a period of five years under a particular name or style is not void.³

An agreement by a particular individual or firm not to manufacture goods in general has been enforced.⁴

A contract restraining the exercise of a trade within a limited locality, when there is reasonable ground for the restriction, may be valid; and if the restriction seem reasonable, its adequacy as a consideration will not be inquired into.⁵

¹ *Van Marter v. Babcock*, 23 Barb. 683; *Curtis v. Gokey*, 66 N. Y. 304; *Live Stock Assn. v. Levy*, 3 N. Y. S. R. 514.

² *Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 478.

³ *Vernon v. Hallam*, 35 Week. Rep. 156, 56 L. J. Ch. 115; but compare *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 437.

⁴ *Taylor v. Blanchard*, 18 Allen, 370.

⁵ *McClurg's App.* 58 Pa. 51; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345. *Jenkins v. Temples*, 39 Ga. 656; *Smith's Appeal*, 5 Cent. Rep. 208, 113 Pa.

A covenant not to be directly or indirectly interested in any voyage to the northwest coast of America, or in any traffic with the natives of that coast, for seven years, was held valid. In that case some weight was given to the obligation of a trust.¹

A contract by a steamship corporation to purchase a competing line, which, in consideration thereof, agrees to discontinue running vessels between ports mentioned, and not to charter or sell their vessels for use on that route, and not to become in any way interested in the running of steamships between those places, is not void as in restraint of trade.²

In *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315, the court enforced the covenant by the defendant made in the purchase of a steamship, that it should not be run or employed in the freight or passenger business in the waters of the State of California for a period of ten years; *contra*, where no time was fixed.³

Where the covenant is partial and not general, it will not be a good objection that it is practically unlimited as to time.⁴

In each particular case the surrounding circumstances are to be considered in determining whether the covenant will operate as a restraint, injurious to the public.⁵ Thus an exclusive right to lay tubing for the conveyance of oil through an extensive tract, which would practically deny this facility to others, was held to be illegal.⁶

An agreement not to engage in a particular business in a certain town for five years, is sustained as being only a limited restraint upon trade.⁷

But courts do not extend the restriction beyond its express terms; where a land agent sold his business, with an agreement

579; *Linn v. Sigbee*, 67 Ill. 75; *Graselli v. Lowden*, 11 Ohio St. 349; *Archer v. Marsh*, 6 Ad. & El. 959; *Hitchcock v. Coker*, 6 Ad. & El. 438; *Pilkington v. Scott*, 15 Mees. & W. 660; *Tallis v. Tallis*, 1 El. & Bl. 391; *Pierce v. Fuller*, 8 Mass. 223; *Lawrence v. Kidder*, 10 Barb. 649; *Palmer v. Graham*, 1 Pars. Eq. Cas. 476.

¹*Perkins v. Lyman*, 9 Mass. 522.

²*Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519.

³*Wright v. Ryder*, 86 Cal. 342.

⁴*Ward v. Byrne*, 5 Mees. & W. 548; *Mumford v. Gething*, 7 C. B. N. S. 317.

⁵*Gibbs v. Consolidated Gas Co.* 180 U. S. 396, 32 L. ed. 979.

⁶*West Virginia Transp. Co. v. Ohio River P. L. Co.* 22 W. Va. 600.

⁷*Washburn v. Dosh*, 68 Wis. 436.

not to re-engage in the identical business in the same place for three years, after the expiration of that time he was not debarred from soliciting the agency of the same lands he had in charge when the contract was made.¹

And acting on this principle it is held that an agreement not to sell milk in a particular town is not violated by selling to one residing outside the town, with knowledge that the purchaser intends to retail the milk within the town.²

There are many illustrations of the application of the rule to special cases, a few of which are given below.³

§ 46. **Legality of Consideration, and Reasonableness of Restriction—Questions of Law.**—Whether a contract is in restraint of trade or not is a question of law for the court and not a question of fact for the jury.⁴ Contracts in restraint of trade where no consideration is shown, are bad.⁵ And indeed the rule is that where no consideration is shown or appears itself on the face of the instrument, the contract, if in fact a contract in restraint of trade, is void, although it is under seal.⁶

The court will not, indeed, if a consideration be shown, examine as to the sufficiency of the consideration, but whether it is a legal one.⁷

¹*Hanna v. Andrews*, 50 Iowa, 462.

²*Smith v. Martin*, 80 Ind. 260.

³See *Davis v. Mason*, 5 T. R. 118; *Mallan v. May*, 11 Mees. & W. 653; *Hayward v. Young*, 2 Chit. 407; *Price v. Green*, 16 Mees. & W. 346; *Tallis v. Tallis*, 1 El. & Bl. 891; *Elves v. Crofts*, 10 C. B. 241; *Jones v. Lees*, 1 Hurlst. & N. 189; *Carroll v. Hicks*, 10 Phila. 308; *Bell's App.* 10 W. N. C. 431; *McClurg's App.* 58 Pa. 51; *Gompers v. Rochester*, 56 Pa. 194; *Bigony v. Tyson*, 75 Pa. 157; *Morse T. D. & M. Co. v. Morse*, 103 Mass. 73; *Dean v. Emerson*, 102 Mass. 480.

⁴*Kellogg v. Larkin*, 3 Chand. 133; *Mallan v. May*, 11 Mees. & W. 653; *Horne v. Graves*, 7 Bing. 743.

⁵*Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102.

⁶*Gompers v. Rochester*, 56 Pa. 194; *Palmer v. Stebbins*, 3 Pick. 188; *Weller v. Hersee*, 10 Hun, 431; *Mitchel v. Reynolds*, 1 P. Wms. 181; *Mallan v. May*, 11 Mees. & W. 655.

⁷*Guerand v. Dandlet*, 32 Md. 561, 3 Am. Rep. 164; *McClurg's App.* 58 Pa. 51; *Pierce v. Fuller*, 8 Mass. 223; *Sainter v. Fergusson*, 7 C. B. 716; *Hitchcock v. Coker*, 6 Ad. & El. 438; *Archer v. Marsh*, 6 Ad. & El. 966; *Leighton v. Wales*, 3 Mees. & W. 551; *Pilkington v. Scott*, 15 Mees. & W. 657; *Tallis v. Tallis*, 1 El. & Bl. 397; *Lawrence v. Kidder*, 10 Barb. 649; *Palmer v. Graham*, 1 Pars. Eq. Cas. 476; *Grasselli v. Lowden*, 11 Ohio St. 349; *Linn v. Sigbee*, 67 Ill. 75; *Jenkins v. Temples*, 89 Ga. 655.

A contract in restraint of trade must have a good consideration and the restraint must be reasonable and limited.¹

The reasonableness of the restriction is a question for the court.²

The authorities are numerous, and conclusively establish the law that contracts in restraint of the freedom of trade must be reasonable.³

In determining whether the contract is reasonable such a limit should be laid down as, under any circumstances, possible within the contemplation of either party, would be sufficient protection to the interests of the contracting party, and if the limit stipulated for does not exceed that, the contract should be held to be valid.⁴

A covenant in restraint of trade is valid if it was induced by a consideration which made it reasonable for the parties to enter therein; and the covenant will be enforced if a disregard thereof by the covenantor will work injury to the covenantee.⁵

Where the restraint of a party from carrying on a trade or business is larger and wider than the protection of the party with whom the contract is made can, under such circumstances, possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it is therefore void.⁶

Before a covenant not to practice medicine in the neighborhood

¹*Holmes v. Martin*, 10 Ga. 508; *Dunlop v. Gregory*, 10 N. Y. 241; *Lange v. Werk*, 2 Ohio St. 520; *Thomas v. Miles*, 3 Ohio St. 275; *Chappel v. Brockway*, 21 Wend. 157; *Holdbrook v. Waters*, 9 How. Pr. 835; *Wright v. Ryder*, 86 Cal. 357; *Brewer v. Marshall*, 19 N. J. Eq. 537; *Mitchel v. Reynolds*, 1 P. Wms. 181; *Hitchcock v. Coker*, 6 Ad. & El. 438.

²*Linn v. Sigobes*, 67 Ill. 81.

³*Horner v. Graves*, 7 Bing. 743; *Hitchcock v. Coker*, 6 Ad. & El. 438; *Mallan v. May*, 11 Mees. & W. 658, 664, 666; *Baines v. Geary*, L. R. 35 Ch. Div. 154; *Davies v. Davies*, L. R. 36 Ch. Div. 359, 396, 397, 398; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 368; *Nat. Prov. Bank v. Marshall*, L. R. 40 Ch. Div. 112; *Diamond Match Co. v. Roeder*, 9 Cent. Rep. 181-187, 106 N. Y. 478-487; *Pollock*, Cont. 815, 816.

⁴*Mallan v. May*, 11 Mees. & W. 658, 667; *Tallis v. Tallis*, 1 El. & Bl. 391. See *Printing & Numerical Registering Co. v. Sampson*, 89 L. T. N. S. 854, L. R. 19 Eq. 462, 465.

⁵*Hodge v. Sloan*, 9 Cent. Rep. 870, 107 N. Y. 244.

⁶*Hitchcock v. Coker*, 6 Ad. & El. 438, 454; *Ward v. Byrne*, 5 Mees. & W. 543, 561; *Horner v. Graves*, 7 Bing. 753; *Whittaker v. Howe*, 3 Beav. 383.

can be enforced, evidence must show that it is reasonable under the existing facts.¹

§ 47. **Presumption as to Legality of Contracts in Partial Restraint of Trade.**—Contracts in partial restraint of trade have been said to be presumptively void, and that such presumption can be rebutted only by showing that it was entered into for good reasons, and that the burden of showing the facts rendering the contract valid rests upon the party seeking to enforce it.²

It was said in *Mitchel v. Reynolds*, 1 P. Wms. 181, 191, that "whenever such contract *stat indifferenter*, and for aught appears, may be either good or bad, the law presumes it *prima facie* to be bad."³ But this doctrine has been disapproved in England, and it is now said that there is no "hard and fast rule" that a contract in restraint of trade, limited as to space, is invalid; but the validity depends upon the reasonableness of the contract.⁴ Indeed it is now declared that contracts involving the question of interference with trade are *prima facie* valid.⁵

§ 48. **Contract in Restraint of Trade Legal in Part and Severable.**—Although there may be one of the stipulations in a contract which may be considered as illegal, yet this will not defeat a recovery on the other parts of the contract, when the stipulations are divisible and the consideration is not in itself illegal.⁶

A covenant as to place, "in the county of Lehigh or elsewhere," is divisible and valid as to the county.⁷ But a court will only

¹*McNutt v. McKoen*, 10 Phila. 112.

²*Ross v. Sadgbeer*, 21 Wend. 166.

³See also *Mandeville v. Harman*, 5 Cent. Rep. 625, 42 N. J. Eq. 185.

⁴*Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, following *Leather Cloth Co. v. Lorrson*, 21 L. T. N. S. 661, L. R. 9 Eq. 345, and disapproving *Allsopp v. Wheatcroft*, 27 L. T. N. S. 372, L. R. 15 Eq. 59.

⁵*Pollock*, Cont. 315; *Mogul Steamship Co. v. McGregor*, L. R. 21 Q. B. Div. 544, 552.

⁶*Green v. Price*, 13 Mees. & W. 695; *Price v. Green*, 16 Mees. & W. 346; *Bank of Australasia v. Breillat*, 6 Moore, P. C. 152; *Moxfield v. Wadley*, 3 Barn. & C. 357, 5 Dowl. & R. 228; *Kerrison v. Cole*, 8 East, 231; *McAllen v. Churchill*, 11 Moore, 463.

⁷*Smith v. Fell*, 5 Cent. Rep. 208, 113 Pa. 579; *Thomas v. Miles*, 8 Ohio St. 274. See *Mallan v. May*, 11 Mees. & W. 653; *Green v. Price*, 13 Mees. & W. 695, 16 Mees. & W. 346; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175, 17 L. ed. 520; *Goodwin v. Clark*, 65 Me. 290; *Carlton v. Woods*, 28 N. H. 290; *Van Dyck v. Van Beuren*, 1 Johns. 362; *Saratoga Co. Bank v.*

attempt to make a separation of the good consideration from that which is illegal in those cases where the party seeking to enforce the contract is not the wrongdoer.¹

Where an act, though the result of an unlawful contract, is itself lawful, it may form the consideration for a lawful agreement,—as, for instance, the actual transfer of stock, the agreement for which was illegal.²

So an agreement between former partners in an illegal business, to defend their former agents against criminal prosecution, is not tainted by the illegality of the business.³

The general rule is that where the illegal is so interwoven with the material portion of the contract that it cannot be severed from the legal part of the covenant, the contract is altogether void. If the connection between the evil and good be such as to make the consideration an entirety, and incapable of severance, the whole promise is void; otherwise it may be upheld by the good⁴ where it can be so severed, whether the illegality be created by the statute or by the common law; the illegal or vicious part may be rejected and the lawful, reasonable and just portion retained.⁵

Agreements in restraint of trade, whether under seal or not, may, like any other form of contract, be either indivisible or divisible. Where one part thereof is void as being in restraint of

King, 44 N. Y. 89; *Leavitt v. Palmer*, 8 N. Y. 19; *Hook v. Gray*, 6 Barb. 898; *Tracy v. Talmage*, 14 N. Y. 162; *Leavitt v. Blatchford*, 5 Barb. 9. See Benj. Sales, § 505; *Carrigan v. Lycoming F. Ins. Co.* 53 Vt. 418; *Lange v. Werk*, 2 Ohio St. 519; *Widos v. Webb*, 20 Ohio St. 451; *Hynds v. Hays*, 25 Ind. 81; *Kimbrough v. Lane*, 11 Bush, 556; *Newberry Bank v. Stegall*, 41 Miss. 142; *Valentine v. Stewart*, 15 Cal. 887.

¹*Saratoga County Bank v. King*, 44 N. Y. 87.

²*Tyler v. Tyler*, 126 Ill. 525, 9 Am. St. Rep. 642.

³*Hutchinson v. Dornin*, 28 Mo. App. 575.

⁴*Webb v. Allington*, 27 Mo. App. 559.

⁵*Pickering v. R. R. Co.* L. R. 3 C. P. 250, citing *Maleverer v. Redshaw*, 1 Mod. 85; *Collins v. Blantern*, 2 Wils. 351; *United States v. Bradley*, 35 U. S. 10 Pet. 843, 9 L. ed. 448; *Deering v. Chapman*, 23 Me. 488; *Roby v. West*, 4 N. H. 285; *Coburn v. Odell*, 30 N. H. 540; *Woodruff v. Hinman*, 11 Vt. 592; *Frazier v. Thompson*, 2 Watts & S. 285; *Raguet v. Roll*, 7 Ohio, 70; *McBratney v. Chandler*, 22 Kan. 692; *Everhart v. Puckett*, 73 Ind. 409; *Anderson v. Powell*, 44 Iowa, 20; *White v. Jones*, 1 Scott, 730; *Newman v. Newman*, 4 Maule & S. 66; *Gaskell v. King*, 11 East, 165; *Wigg v. Shuttleworth*, 18 East, 87; *Ladd v. Dillingham*, 34 Me. 316; *Rose v. Truax*, 21 Barb. 861; *Donallen v. Lennox*, 6 Dana, 91; *Langdon v. Gray*, 52 How. Pr. 387; *Tobey v. Robinson*, 99 Ill. 222.

trade, while the other is not, the court will give effect to the latter if it is capable of independent enforcement and will not hold the agreement to be altogether void.¹

Illegality of one provision in such a contract will not necessarily make the entire contract void.²

Where a contract consists of divisible restrictions, some of which are unreasonable, and others are sustainable as not going beyond the interest to be protected, the part that is unreasonable may be rejected and the other enforced. Thus a stipulation not to engage in a particular trade for a limited time, "in the city of St. Louis, or at any other place," was held only to restrain the party within the city of St. Louis,³ and the same rule has been applied elsewhere.⁴

But in *Bishop v. Palmer*, 6 New Eng. Rep. 129, 146 Mass. 469, where the contract was not to engage in trade for five years, without any limit as to space, and not to enter into the cotton waste business in the city of Fall River for five years, it was held that as the promise not to engage in trade without limit of space was void, as it tends to injure the public, it is deemed a vicious one, and rests upon the same ground as though forbidden by statute,⁵ and the promise being for one entire consideration, a part of which is fraudulent, immoral or unlawful, and there being no means of apportionment furnished by the parties themselves, no action would lie upon the promise. As the bad part of the contract is not severable from the good, the whole promise fails.⁶ It was contended that the defendants, by being unable to enforce the stipulation in question, only lose what they were bound to know was legally null; that they have all they supposed they were getting, namely, a promise which might be kept, though

¹*Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 215.

²*Western U. Teleg. Co. v. Burlington & S. R. Co.* 11 Fed. Rep. 1.

³*Pelts v. Eickell*, 62 Mo. 171.

⁴*Smith v. Fell*, 5 Cent. Rep. 208, 113 Pa. 579; *Dean v. Emerson*, 102 Mass. 480; *Beard v. Dennis*, 6 Ind. 200; *Smith's App.* 5 Cent. Rep. 209, 113 Pa. 579; *Lange v. Werk*, 2 Ohio St. 520.

⁵*Hynds v. Hays*, 25 Ind. 81, 86; *White v. Buss*, 3 Cush. 449.

⁶See *Robinson v. Green*, 3 Met. 161; *Rand v. Mather*, 11 Cush. 1; *Woodruff v. Wentworth*, 183 Mass. 309, 314; *Bliss v. Negus*, 8 Mass. 51; *Clark v. Ricker*, 14 N. H. 144; *Woodruff v. Hinman*, 11 Vt. 592; *Pickering v. Ilfracomb R. Co.* L. R. 8 C. P. 250; *Harrington v. Victoria Graving Dock Co.* L. R. 8 Q. B. Div. 549; 2 Chitty, Cont. (11th Am. ed.) 972; *Leake*, Cont. 779, 780; *Pollock*, Cont. 321; *Met. Cont.* 247.

incapable of legal enforcement, and that if they were content to accept such a promise, and if there is another good and sufficient consideration, they may be held upon their promise. But the court deny that the argument can properly extend to a case where a part of an entire and inseparable consideration is positively vicious, however it might be if it were simply invalid, as in *Parish v. Stone*, 14 Pick. 198. The fact that the plaintiff had not failed to perform his promise not to engage in the business mentioned, does not enable him to maintain his action.

An illegal consideration may be actual, substantial and valuable, but it is not in law sufficient. It may be that if defendants were to sue the plaintiff on the contract, they could, so far as the question of legality is concerned, maintain the action upon all its parts except the single covenant.¹ It might be that if defendants pay to plaintiff the entire sum called for by the contract, they can call upon him to perform all of his agreements, except such as are unlawful. In such case they would merely waive a part of what they were to receive and recover or enforce the rest, but the court denied that this fact gave a right of action to the plaintiff, when a part of the consideration of the promise was illegal. The defendants were at liberty to repudiate the contract on this ground, and having done so, the plaintiff cannot maintain an action on his contract for the purchase price agreed upon for the sale of his business. What other liability the defendants might be under to the plaintiff by reason of what they may have received under the contract, of course, is another question.

§ 49. Partial Restriction of Trade not Permissible by Corporations.—But the ordinary rule that contracts in partial restraint of trade are not invalid, does not apply to corporations engaged in a public business and in furnishing that which is a matter of public concern. If there be any sort of business which from its particular character can be restrained to no extent whatever without prejudice to public interest, the courts would be compelled to hold void any contract imposing any restraint, however partial, on such corporate business, where it is shown that

¹*Mallan v. May*, 11 Mees. & W. 653; *Green v. Price*, 13 Mees. & W. 695, 16 Mees. & W. 346.

such partial restraint must be regarded as prejudicial to public interest.¹

There may be cases where a corporation may abandon a public work for reasonable cause,² but this presents altogether a different question for determination, from that presented when a corporation attempts to disable itself by contract from the performance of a duty to the public.³

Certainly a court of equity will not aid either party in the enforcement of a contract by which a corporation abandons a public duty.⁴

At the present day there is not that danger, resulting to the public from contracts restraining trade as formerly, or at least it does not seem to exist to an appreciable extent—except possibly as suggested in the case of corporations. In their supervision and in their restriction within the limits of their chartered powers, the government and the public are directly interested. Corporations are great engines for the promotion of the public convenience and for the development of public wealth, and so long as they are conducted for the purposes for which organized they are a public benefit; but if allowed to engage, without supervision, in subjects of enterprise foreign to their charters, or if permitted unrestrainedly to control and monopolize the avenues to that industry in which they are engaged, they become a public menace, against which public policy and statutes design protection.

It seems where the provisions of corporate agreements in restraint of competition tend beyond measures of self protection and threaten the public good in a distinctly appreciable manner, courts, in the exercise of their equitable powers, may interfere,

¹*West Va. Transp. Co. v. Ohio River P. L. Co.* 22 W. Va. 600; *Oraft v. McConoughy*, 79 Ill. 346; *Chicago Gaslight & C. Co. v. People's Gaslight & C. Co.* 11 West. Rep. 69, 121 Ill. 530.

²*State v. New Haven & N. Co.* 41 Conn. 184. See *People v. Colorado C. R. Co.* 42 Fed. Rep. 688.

³*Chicago Gaslight & C. Co. v. People's Gaslight & C. Co.* 11 West. Rep. 69, 121 Ill. 530; *West Virginia Transp. Co. v. Ohio River P. L. Co.* 22 W. Va. 600.

⁴*West Virginia Transp. Co. v. Ohio River P. L. Co.* 22 W. Va. 600; *State v. Hartford & N. H. R. Co.* 29 Conn. 588; *St. Louis, J. & O. R. Co. v. Mathers*, 71 Ill. 592; *Chicago Gaslight & C. Co. v. People's Gaslight & C. Co.* 11 West. Rep. 69, 121 Ill. 530; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411.

but should not do so unless the apprehension of danger to the public interests rests upon evident grounds.¹

In *Chicago Gaslight & C. Co. v. People's Gaslight & C. Co.* 11 West. Rep. 69, 121 Ill. 530, the defendant company claiming as the assignee of the exclusive privilege in the territory set off to it, filed a bill against the other for a specific performance of the contract of assignment. The court refused the relief sought, holding "that by the grant of the second charter the Legislature intended to do away with the monopoly," granted under the first; "that although the contract involved a partial restraint of trade, and therefore might not, by the general rule of law, be invalid, yet that the general rule does not apply to corporations engaged in a public business in which the public have an interest," and that the contract was void.

If, as has been repeatedly ruled, clothing a corporation with the power of eminent domain so stamps the business of such corporation with a public character, that that business may not be restricted by private contract,² there is no reason why the same public character should not attach to a corporation which is vested with the right and power to tear up and use the streets of a great city. The fee of the streets, or at least the control of the streets, is vested in such city for the benefit of the public. Any business which requires their use, requires the use of property which belongs either absolutely or unrestricted, so far as the public service requires control, to the public.³

Thus where a gas company has the exclusive privilege under its charter of supplying the city of Chicago for ten years, a contract during that period, foregoing that exclusive right within a part of such territory, would be valid as parting only with the privilege conferred for the benefit of the company; but, where, after the expiration of such exclusive privilege, when another corporation

¹*Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519.

²*Peoria & R. I. R. Co. v. Coal Valley Min. Co.* 68 Ill. 489; *Thomas v. West Jersey R. Co.* 101 U. S. 83, 25 L. ed. 952; *St. Louis v. St. Louis Gaslight Co.* 70 Mo. 69; *State v. Hartford & N. H. R. Co.* 29 Conn. 588; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411; *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592; *West Virginia Transp. Co. v. Ohio River P. L. Co.* 22 W. Va. 600.

³*Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160; *Chicago Gaslight & C. Co. v. Peoples Gaslight & C. Co.* 11 West. Rep. 69, 121 Ill. 530.

likewise authorized to supply the gas had entered upon the discharge of its duties under its charter, and had laid mains and pipes east of the Chicago River, and the company whose exclusive privilege had expired had laid mains and pipes west of the river, a contract providing for the exchange of these properties, under which forty thousand dollars was paid by the company laying its mains east of the Chicago River, to the company formerly owning the exclusive privilege for the excess in value of the latter's interest on the west side over the value of the former company's interest east of the river, and transferring to such company the interest of the company lately holding the monopoly, and its contract with the city for lighting the lamps on the west side, both parties covenanting, each with the other, to use such reasonable and proper influence as they respectively may have with the authorities of the city of Chicago, to procure a division of said contract, and a new and independent contract between said city and the company furnishing gas in the west division, each covenanting that it will not, for one hundred years, interfere with the other in the territory in which the exchange of property has been effected—this agreement was determined to be one which tends to create and perpetuate a monopoly in the furnishing of gas to the city, and therefore against public policy, and as to each of the corporations, is *ultra vires*.¹

To a contract thus perpetuating a monopoly, the ordinary rule invalidating a contract of restraint, which has no reasonable limit as to time, must apply, for there is nothing in the nature of a franchise which makes a contract between parties in reference to time less obligatory than one made in reference to other matters.²

The exercise and use of franchises of a corporation for the benefit of the public is a condition on which it is allowed to be created and maintained; and when it voluntarily declines to fulfill this condition or places itself in a situation, as a consequence of its voluntary action, in which that may be prevented, it may be annulled.³

An agreement between two gas companies, of the same city,

¹*Chicago Gaslight & C. Co. v. People's Gaslight & C. Co.* 11 West. Rep. 63, 121 Ill. 530.

²*Morris v. The Leona*, 67 Tex. 308.

³*People v. North River Sugar Ref. Co.* 5 L. R. A. 387, 54 Hun, 854.

for the abandonment by one of the companies of the discharge of its duties to the public, and that the price of gas as fixed thereby should not be changed below a certain specified rate without the consent of the other, especially where one of the companies is prohibited by statute from entering into such a contract, is an illegal contract.

The supplying of illuminating gas is in its essence a business of a public nature, to meet a public necessity; and where such business cannot be restrained without prejudice to the public interest, and it is hardly conceivable that such restraint can otherwise result, contracts imposing such restraints, however partial, will not be enforced or sustained, because in contravention of public policy. It may be stated, as a sound rule, that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, nor, by agreement, compel itself to make public accommodation subservient to its private interests.¹

¹*Gibbs v. Consolidated Gas Co.* 180 U. S. 396, 82 L. ed. 979.

CHAPTER X.

MONOPOLY.

§ 50. *Monopoly as Opposed to Popular Government.*

51. *Monopoly Based upon Oppression and Usurpation of the Rights of Others.*

52. *Combinations to Control the Necessaries and Comforts of Life.*

53. *Effect of Constitutional Provisions Regarding Monopolies.*

54. *Combinations Tending to Impede Competition, Illegal.*

§ 50. **Monopoly as Opposed to Popular Government.**—In the public interest a monopoly is sometimes allowed in order to promote the public health or the public security, or increase public comfort, or to secure aid to the government in the development of some public enterprise, or the more efficient carrying forward some great public undertaking.¹ But the government itself usually retains a control over such monopoly, to prevent it being used as an instrument of oppression on for the purpose of irregular and inordinate private gain. In itself the very idea of monopoly is contrary to the genius and spirit of free institutions and government. It is in conflict with constitutional precedents and destructive of free institutions.

Where, by an amendment to the charter of a gas company authorizing it to lay its pipes through the streets and public grounds of a city, it is provided that the rights shall be exclusive except as against such other persons as may be authorized by Legislature, such provision is held to constitute a monopoly which is not entitled to protection in equity, and an injunction will not be allowed to prevent another company from laying down its gas pipes.²

While there may be no direct constitutional provision or declar-

¹*Slaughter House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525; *New Orleans Gaslight Co. v. La. Light & Heat Co.* 115 U. S. 650, 29 L. ed. 516; *Louisville Gas Co. v. Citizens Gaslight Co.* 115 U. S. 688, 29 L. ed. 510.

²*Norwich Gaslight Co. v. Norwich City Gas Co.* 25 Conn. 19; High, Inj. 333.

atory legislation against a monopoly, yet the very nature and essence of a free government is opposed to monopolies, and the usual Bill of Rights appearing in most state constitutions, which declares in terms or in effect that no man or set of men are entitled to exclusive public emoluments or privileges from the community, indicates this hostility.¹

As a general rule no agreement will be sustained, the effect of which would be to fasten on the community the monopoly of an important staple or industry, although it has been held in Massachusetts that an agreement not to run an opposition stage between Boston and Providence was valid, on the ground that the act complained of was a breach of trust;² and the same reason may be applied to a ruling made shortly afterwards sustaining an agreement not to compete for seven years in the northwest trade.³

§ 51. **Monopoly Based upon Oppression and Usurpation of the Rights of Others.**—Monopolies are in opposition to the enjoyment of common rights and are in fact the usurpation of such rights.⁴

The oppressive nature of the principle upon which a monopoly is rested will clearly appear if applied to the usual trades and employments in life. The granting of the exclusive right to engage in such vocations would be repudiated in all communities as an invasion of common right. The State may undoubtedly require many kinds of business to be carried on beyond the thickly settled portions of a city, or even entirely without its limits, especially if attended with odors and noises which affect the health or disturb the peace of the neighborhood; but even the

¹4 Bacon, Abr. p. 764, title *Monopoly*; 4 Bl. Com. 160; Hindmarch, Patents, chap. 2, p. 7 *et seq.*

²*Pierce v. Fuller*, 8 Mass. 228.

³*Perkins v. Lyman*, 9 Mass. 522.

⁴*Norwich Gas Light Co. v. Norwich City Gas Co.* 25 Conn. 19; *People v. North River Sugar Ref. Co.* 2 L. R. A. 33, 22 Abb. N. C. 164; *Slaughter House Cases*, 83 U. S. 16 Wall. 102, 26 L. ed. 417; *Hudson v. Thorne*, 7 Paige, 261, 4 L. ed. 148; *Chicago v. Rumpff*, 45 Ill. 90; *Live Stock D. & B. Assn. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. U. S. 398; *Rez v. Waddington*, 1 East, 167; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 672; *The Case of Monopolies*, 11 Coke, 84b.; *Brenham v. Brenham Water Co.* 67 Tex. 561; *Craft v. McConoughy*, 79 Ill. 346; *Slaughter House Case*, 1 Woods, 21; *Skrainka v. Scharringhausen*, 8 Mo. App. 523; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160; *Hoffman v. Brooks*, 11 Week. L. Bull. 359; *Alger v. Thacher*, 19 Pick. 51.

exercise of this necessary power does not warrant the granting to particular classes or corporations a monopoly of the business thus permitted.¹

An ordinance preventing a citizen from engaging in a particular business in a certain locality, while it permits another to so engage, is oppressive and void.²

A contract between a city and an attorney, declaring itself irrevocable, and giving to the attorney annually for twenty years, one third of all rents and receipts from ferry and bridge privileges, and mutually binding the parties to do no act and to make no contract interfering with its terms, is in contravention of public policy and cannot be enforced.³

Power exercised to control business or trade by the combination of selfish interests, for the sake of private gain—to ruin the many to enrich the few—undermines the very principle which sustains a government of the people for the good of the many, rather than for the profit of the few, at the expense of the many. These two conflicting aims cannot exist long in a government without working its destruction as a free State. Monopoly destroys individual rights and freedom of individual action, and enables vast combinations of wealth, influence and selfish energy, to crush private enterprise and competition.

§ 52. Combinations to Control the Necessaries and Comforts of Life.—All such combinations, whether calculated to control the necessities of life or simply the ordinary comforts and conveniences introduced by advancing civilization, should meet the active opposition of both legislative, executive and judicial power,⁴

¹*Butchers U. S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 764, 28 L. ed. 589.

²*Com. v. Bearse*, 132 Mass. 551; *Myers v. Baker*, 9 West. Rep. 490, 120 Ill. 567; *Tugman v. Chicago*, 78 Ill. 405; *Chicago v. Rumpff*, 45 Ill. 90.

³*Waterbury v. Laredo*, 68 Tex. 565.

⁴*The Case of Monopolies*, 11 Coke, 84 b; *Rez v. Waddington*, 1 East, 167; *People v. North River Sugar Ref. Co.* 2 L. R. A. 33, 23 Abb. N. C. 164; *Com. v. Hunt*, 45 Mass. 111; *Com. v. Wallace*, 16 Gray, 221; *Com. v. Prius*, 9 Gray, 127; *Com. v. Eastman*, 1 Cush. 189; *Alger v. Thacher*, 19 Pick. 51; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178; *Crawford v. Wick*, 18 Ohio St. 190; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Marsh v. Russell*, 66 N. Y. 288; *Kelley v. Derlin*, 58 How. Pr. 487; *Woodruff v. Berry*, 40 Ark. 251; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 484; *Craft v. McConoughy*, 79 Ill. 346; *Raymond v. Learitt*, 46 Mich. 447, 41 Am. Rep. 170; *Re Richmond Retail Coal Co.*, (Pa.) 9 Ry. & Corp. L. J. 81.

as, an agreement to absorb and monopolize the transportation of a community.¹

Whatever may be the immediate effect of such monopoly, though at its inception it may reduce prices for the purpose of crushing existing competition, its final result is to vest in those in control of the monopoly the absolute fixing of values. It does not do this upon the natural law, of supply and demand, but creates an artificial scarcity of the article, to be filled only upon compliance with its terms. It has repeatedly been condemned by the courts as unlawful. Agreements to create a monopoly and to stifle competition in trade are void, and conspiracies to control trade are indictable even at common law and should be met with firm resistance among a free and independent people, desirous of maintaining commercial liberty.²

That combinations to control the necessities or comforts of civilized communities should be resisted by legislative power, is shown in the enactments of many of the states and in the Act of Congress, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

"Sec. 1. Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the sev-

¹*Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 424; *Maguire v. Smock*, 42 Ind. 1.

²*People v. North River Sugar Ref. Co.* 2 L. R. A. 83, 22 Abb. N. C. 164; *Ree v. Cope*, 1 Strange, 144; *Ree v. De Berenger*, 3 Maule & S. 68; *Ree v. Norris*, 2 Id. Ken. 800; *Reg. v. Gurney*, 11 Cox, Cr. Cas. 414; *Levi v. Levi*, 6 Car. & P. 239.

eral states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 3. Every contract, combination, in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or territories and any State or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or states or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"Sec. 5. Whenever it shall appear to the court before which any proceeding under section 4 of this Act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

"Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this Act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"Sec. 8. That the word 'person' or 'persons,' wherever used in this Act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country."

Nor can the obligations under which the courts rest to enforce such legislation be more clearly shown than in an opinion pronounced by *Judge Key* in the United States Circuit Court for the Middle District of Tennessee, where suit was brought to enjoin certain coal mining companies from unlawfully combining to restrain interstate trade and commerce in coal at Nashville contrary to the provisions of the United States statute.

On September 25, 1890, a petition for injunction was filed setting forth as follows:

That the defendants, a number of whom are Kentucky mining companies, and another number are coal dealers in Nashville, Tennessee, secretly entered into an illegal contract and combination in the form of a trust, and entered into a conspiracy with one another, and engaged at Nashville in a combination and conspiracy which restrained the trade and commerce in coal at Nashville between the states of Kentucky, Alabama and Tennessee.

That the defendants combining and confederating, by articles

of agreement more particularly set forth in the decision (see decision), under the name of the "Nashville Coal Exchange" monopolized the trade in coal which is produced in Kentucky and shipped from thence to Nashville, Tennessee, contrary to the provisions of this Act. The prayer of the petition is that the defendants be enjoined or otherwise prohibited from violating the provisions of the said Act of Congress and that they be enjoined and restrained from further monopolizing and carrying on the coal trade in Nashville under the combination and confederation as aforesaid.

A brief abstract of the argument and citations of authorities of counsel in the case is of value. Mr. John Ruhm, U. S. Atty., for complainant insisted that the power of Congress to enact the statute which is the basis of this lawsuit is derived from U. S. Const., art. 1, § 8, subsecs. 3, 18, giving Congress power to regulate commerce among the states. This power is unlimited and paramount; it is co-extensive with the entire field of commerce.¹

Interstate commerce consists of traffic and transportation between the states; and Congress may regulate the traffic, or the transportation, or both.²

The power to regulate is unlimited, so long as it is confined to interstate commerce.³

Congress may confer little, or much, or all jurisdiction upon the existing inferior federal courts, or may create other courts and clothe them with jurisdiction in all matters, where the subject of legislation is within the power delegated by the Constitution.⁴

In the absence of a statute the United States may become a

¹ *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 847; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 16, 6 L. ed. 23; *United States v. Marigold*, 50 U. S. 9 How. 560, 13 L. ed. 257; Hare, Am. Const. Law, 438.

² *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 847; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 16, 6 L. ed. 23; *Brown v. Maryland*, 25 U. S. 13 Wheat. 419, 6 L. ed. 678; *Groves v. Slaughter*, 40 U. S. 15 Pet. 449, 10 L. ed. 800; *United States v. Bailey*, 1 McLean, 284; *Brig Wilson v. United States*, 1 Brock. 423; *United States v. Marigold*, 50 U. S. 9 How. 560, 13 L. ed. 257; *Kidd v. Pearson*, 128 U. S. 20, 32 L. ed. 350. See also *State v. Welton*, 55 Mo. 223; *People v. Brooks*, 4 Denio, 469; *Ogden v. Gibbons*, 4 Johns. Ch. 150, 1 L. ed. 797; *State v. Delaware, L. & W. R. Co.* 30 N. J. L. 473, 31 N. J. L. 581.

³ *Kidd v. Pearson*, 128 U. S. 20, 32 L. ed. 350; Tiedeman, Pol. Powers, § 202.

⁴ *United States v. Union Pac. R. Co.* 93 U. S. 596, 25 L. ed. 150; *Osborn v. United States Bank*, 22 U. S. 9 Wheat. 826, 6 L. ed. 225.

party to a suit in the federal courts brought in its own name where it has a pecuniary interest.¹

Or where the subject-matter arises under an Act of Congress, or where a fraud has been committed in a matter arising under an Act of Congress.²

The power of Congress to expressly authorize a suit in the federal courts in the name of the United States has never been questioned.³

At common law contracts are held void:

"1. Where their effect is in general restraint of trade.

"2. Where the restraint is partial only, either as to time or place, but where it is unreasonable, or where it injuriously affects the public, or where there is no consideration to support it.

"3. Where there is a combination to stifle competition, or to control the prices of the necessities of life.

"4. What is an unreasonable restraint, and whether or not the contract is injurious to the public, is always a question of law for the court, to be determined from the face of the contract.⁴

"5. Courts will not inquire whether or not the agreement entered into has in fact caused an injury to the public or has caused an unreasonable restraint. The inquiry merely is whether the agreement has a tendency to produce the effect.⁵

"The present statute adopts these principles of the common law so far as they relate to interstate commerce, but goes one step further and removes the difficulty of investigating whether the

¹ *United States v. Barker*, 25 U. S. 12 Wheat. 559, 6 L. ed. 728.

² *United States v. San Jacinto Tin Co.* 125 U. S. 278, 31 L. ed. 747.

³ *United States v. San Jacinto Tin Co.* 125 U. S. 278, 31 L. ed. 747; *Jessup v. United States*, 106 U. S. 150, 27 L. ed. 86; *United States v. Tingey*, 30 U. S. 5 Pet. 115, 8 L. ed. 66; *United States v. Bradley*, 35 U. S. 10 Pet. 343, 9 L. ed. 448; *United States v. Linn*, 40 U. S. 15 Pet. 290, 10 L. ed. 742; *Nashville v. Cooper*, 78 U. S. 6 Wall. 251, 18 L. ed. 852.

⁴ 1 Wharton, Cont. § 483; Bishop, Cont. § 517; 2 Pom. Eq. Jur. § 984.

⁵ *Mitchel v. Reynolds*, 1 P. Wms. 181, and note in 1 Smith, Lead. Cas. 9th Am. ed. 712 et seq.; *Angier v. Wedder*, 14 Allen, 211, and editorial note, 92 Am. Dec. 751; *Leslie v. Lorillard*, 1 L. R. A. 456, and note, 110 N. Y. 519; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Horner v. Graves*, 7 Bing. 748; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 815; *Taylor v. Blanchard*, 18 Allen, 370; *Crawford v. Wick*, 18 Ohio St. 190; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *West Virginia Transp. Co. v. Ohio R. P. L. Co.* 22 W. Va. 617, 46 Am. Rep. 527; *People v. North River Sugar Ref. Co.* 2 L. R. A. 83, and note, 22 Abb. N. C. 164.

restraint is partial or general—it applies the regulation *ex vi termini* to any part of interstate trade.”

Mr. James Trimble, Special Asst. to U. S. Atty., made the following additional points for complainant:

As courts of equity, the United States circuit courts, by their inherent jurisdiction, regardless of the Act of July 2, 1890, have jurisdiction of the subject matter to grant the relief prayed.¹

Article 1, § 8, of the Constitution confers upon Congress the power “to regulate commerce” etc., and “to make all laws, which shall be necessary and proper for carrying” the foregoing powers “into execution.”

“The power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.”

As to “interstate commerce,” the United States, as a government, possesses unlimited power, and can by congressional action exercise all the rights of “a sovereign government.” One of the well recognized powers of a sovereign government is to institute proceedings in its own name on behalf of the public, or to permit its name to be used by private individuals specially injured, to prevent and restrain public nuisances.²

A combination, the tendency of which is to prevent general competition and to control prices, is detrimental to the public and unlawful.³

¹Foster, Fed. Pr. chap. 1, § 5; Story, Eq. Jur. §§ 921, 923; Morawetz, Priv. Corp. § 1043; Pom. Eq. Jur. § 1349; *Atty. Gen. v. Cleave*, 18 Ves. Jr. 211; *Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Pet. 91, 9 L. ed. 1012; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 18 How. 518, 14 L. ed. 249; *Mississippi & M. R. Co. v. Ward*, 67 U. S. 2 Black. 485, 17 L. ed. 311; *Gilman v. Philadelphia*, 70 U. S. 8 Wall. 725, 18 L. ed. 99; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629.

²*Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1-197, 6 L. ed. 23-70; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238. Also *Gilman v. Philadelphia*, 70 U. S. 8 Wall. 725, 18 L. ed. 99; *Leisy v. Hardin*, 135 U. S. 100-108, 34 L. ed. 123-132.

³Story, Eq. Jur. §§ 923, 924; *Atty. Gen. v. Tudor Ice Co.* 104 Mass. 244; *Dist. Atty of East Dist. v. Lynn & B. R. Co.* 16 Gray, 245; *Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Pet. 98, 9 L. ed. 1015; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 18 How. 518, 14 L. ed. 249.

⁴*People v. North River Sugar Ref. Co.* 2 L. R. A. 33, 22 Abb. N. C. 164; *Hooker v. Vandewater*, 4 Denio, 349; *Morris Run U. Co. v. Barclay C. Co.* 68 Pa. 186; *Central Ohio S. Co. v. Guthrie*, 35 Ohio St. 673; *Craft v. McConoughy*, 79 Ill. 346; *Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632; *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.* 9 Ry. & Corp. L. J. 314.

All commerce and trade among the several states shall be free and untrammelled of all restraints and restrictions, unless otherwise prescribed by Act of Congress.¹

The following have been held to be restraints upon trade and commerce among the states :

A state law granting the exclusive right of navigating the Hudson River.²

A state law imposing a tax upon an importer, and requiring a license before he is permitted to sell goods.³

A state law imposing a tax on steamers for each passenger landed within a State.⁴

A state law requiring a stamp upon bills of lading for gold or silver exported from the State.⁵

A special tax by the State on railroad and stage companies for every passenger carried out of the State.⁶

A special tax imposed upon the transportation of freight from one State to another.⁷

A special tax imposed upon the sale of goods not manufactured within the State.⁸

A state law imposing burdensome conditions on the shipmaster as a prerequisite to the landing of passengers, or else to pay a sum on each passenger.⁹

A state law granting a telegraph company the exclusive right to erect and operate a telegraph line within the State.¹⁰

A state tax imposed upon telegraph messages sent without the State.¹¹

¹*Robbins v. Shelby County Taxing Dist.* 120 U. S. 498, 80 L. ed. 696; *Philadelphia & S. M. & S. S. Co. v. Pennsylvania*, 122 U. S. 826, 80 L. ed. 1200; *Leisy v. Hardin*, 135 U. S. 109, 84 L. ed. 182.

²*Gibbons v. Ogden*, 22 U. S. 9 Wheat. 196, 6 L. ed. 70.

³*Brown v. Maryland*, 25 U. S. 12 Wheat. 446, 6 L. ed. 688.

⁴*Passenger Cases*, 48 U. S. 7 How. 288, 12 L. ed. 702.

⁵*Almy v. California*, 65 U. S. 24 How. 165, 16 L. ed. 644.

⁶*Crandall v. Nevada*, 73 U. S. 6 Wall. 39, 18 L. ed. 745.

⁷*State Freight Tar Cases*, 82 U. S. 15 Wall. 282, 21 L. ed. 146; *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 456, 22 L. ed. 678.

⁸*Welton v. Missouri*, 91 U. S. 275, 28 L. ed. 347.

⁹*Henderson v. New York*, 92 U. S. 259, 28 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 28 L. ed. 550.

¹⁰*Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708.

¹¹*Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067.

A special tax imposed upon every alien passenger brought by steamships to a State.¹

A special tax by a city imposed upon persons running tow-boats from the city to certain points without the State.²

A state tax imposed upon steam ferries for the transportation of passengers and freight from one State to another.³

A state tax imposed upon an occupation which necessarily discriminates against the sale of goods brought from another State.⁴

A state tax imposed upon sleeping cars run through the State.⁵

Interstate commerce cannot be taxed at all by a State, even though the same amount be taxed on domestic commerce.⁶

A special tax by the State upon the gross receipts for the carriage of passengers and freight into, out of or through the State.⁷

A general license tax upon a telegraph company.⁸

A license tax upon a "drummer."⁹

A state statute prohibiting the sale, in original packages, of liquor brought into the State, except for medicine, upon license.¹⁰

A license tax imposed upon the agent of a railroad engaged in soliciting travel over his road out of the State.¹¹

A license tax imposed upon a railroad company of one State for the privilege of keeping an office in another State.¹²

A state law providing for the inspection of meat, which practically forbids the importation of meat from another State.¹³

Messrs. Tillman & Tillman, for defendants, argued that the subject of the agreement was not interstate commerce, although the

¹*New York Compagnie Générale Transatlantique*, 107 U. S. 59, 27 L. ed. 888.

²*Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 658.

³*Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158.

⁴*Walling v. Michigan*, 116 U. S. 448, 29 L. ed. 691.

⁵*Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785.

⁶*Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694.

⁷*Fargo v. Stevens*, 121 U. S. 230, 30 L. ed. 888.

⁸*Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311.

⁹*Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637.

¹⁰*Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150.

¹¹*McCall v. California*, 136 U. S. 104, 34 L. ed. 391.

¹²*Leisy v. Hardin*, 135 U. S. 114, 34 L. ed. 184.

¹³*Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455.

intention was to transport the coal to Nashville, although it was purchased for that purpose.

Until actually launched on its way to another State, it is not under the jurisdiction of the United States.¹

These sales, with reference to which the agreement regulates prices, are sales of coal having its *situs* in Nashville. The whole transaction is wholly within the State. This is not interstate commerce. The fact that the coal is brought from another State does not prevent the jurisdiction of Tennessee from attaching.²

The only limitation upon the State, with reference to property brought from another State, and over contracts relating thereto, is, that it cannot take away or impair the right of the importer to sell it in the "original package," "unbroken" and "unopened."³

With these limitations the State has jurisdiction over the property even in the "original package."⁴

The right of the United States to maintain a suit in equity is governed by the same principles which apply to other parties. It must have an interest in the subject-matter.⁵

The bill in this case is nothing else than an "information in equity," charging defendants with a misdemeanor. The Constitution provides that the "trial of all crimes, except in cases of impeachment, shall be by jury," whether that trial is followed by an injunction or a sentence.⁶

The jurisdiction of equity in England to issue injunctions in behalf of the public at the suit of the government is limited to the three following classes of cases:

1. To restrain purprestures of public highways and navigations.⁷

¹*Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 846.

²*Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257.

³*Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150.

⁴*Woodruff v. Parham*, 75 U. S. 9 Wall. 123, 19 L. ed. 382; *Hinson v. Lott*, 75 U. S. 8 Wall. 148, 19 L. ed. 387.

⁵*United States v. Union Pac. R. Co.* 98 U. S. 569, 25 L. ed. 143; *United States v. San Jacinto Tin Co.* 125 U. S. 285, 31 L. ed. 751; *United States v. American Bell Teleph. Co.* 128 U. S. 315, 32 L. ed. 430.

⁶*State v. Uhrig*, 14 Mo. App. 413; *Eilenbecker v. Plymouth County Dist. Ct.* 134 U. S. 31, 33 L. ed. 801.

⁷*Dist. Atty of East Dist. v. Linn & B. R. Co.* 16 Gray, 242; *Atty-Gen. v. Cambridge*, 16 Gray, 247.

2. To restrain threatened nuisances dangerous to the health of the whole community.¹

3. To restrain *ultra vires* acts of corporations injurious to public right.²

The provision of the Act of July 2, 1890, authorizing this proceeding in equity is unconstitutional.³

An agreement between a number of persons to act concernedly in fixing prices at which they will sell a particular product in a particular city is not illegal as being in restraint of trade, unless it appears that they have a monopoly of that product.⁴

The defendants in this case control but an insignificant part of a vast supply of coal. Each coal company has its sole or exclusive agents, or dealers, and will not sell to or through others. This is not illegal or against public policy.⁵

After full consideration of the questions presented, Key, *J.*, delivered the following opinion:

The petition in this case is filed against the members of the Nashville Coal Exchange. The membership of the exchange is composed of various coal mining companies operating mines in Kentucky and Tennessee, chiefly in Kentucky, and of persons and firms dealing in coal at Nashville, Tenn. It is alleged that the purposes, objects and agreement of the defendants are in violation of an Act of Congress approved July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," and the petition seeks to restrain and prevent the violations of the Act by injunction under section 4 of the law. The first section of the Act declares that "every contract or com-

¹ *Atty-Gen. v. Blount*, 4 Hawks, 384; *Atty-Gen. v. Hunter*, 1 Dev. Eq. 12.

² *Atty-Gen. v. Litchfield Corp.* 18 Sim. 546; *Atty-Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425.

³ *Mugler v. Kansas*, 123 U. S. 273, 31 L. ed. 214; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253.

⁴ *Ladd v. Southern Cotton Press & Mfg. Co.* 53 Tex. 173; *Seeligson v. Taylor Compress Co.* 56 Tex. 219; *Wickens v. Evans*, 3 Younge & J. 818; *Skrasinka Scharringhausen*, 8 Mo. App. 522; *Ontario Salt Co. v. Merchants Salt Co.* 18 Grant, Ch. 540; *Marsh v. Russell*, 66 N. Y. 288. See Senate Debate, Congressional Record, 1st Session, 51st Congress, p. 2642; *Com. v. Hunt*, 4 Met. 111; *Masters' Stevedores Assn. v. Walsh*, 2 Daly, 1; *Kellogg v. Larkin*, 3 Pinn. 124; *Pratt v. Hutchinson*, 15 East, 511.

⁵ *Brown v. Rounsavell*, 78 Ill. 539; *Lightner v. Menzel*, 35 Cal. 452; *Van Marter v. Babcock*, 23 Barb. 688; *Greenhood*, Pub. Pol. 708.

bination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, is declared illegal." The second section declares that, "every person who shall monopolize or combine or conspire with another person or persons to monopolize any part of the trade or commerce among the several states . . . shall be guilty of a misdemeanor." A violation of the first section is a misdemeanor also. By the fourth section jurisdiction is conferred upon the circuit courts of the United States to prevent and restrain violations of the Act, and it is made the duty of district attorneys in their respective districts, under the direction of the Attorney-General of the United States, to institute proceedings in equity to prevent and restrain such violations. The articles of agreement between the defendants provide, amongst other things, that the objects of this exchange are, "to do all in its power to advance the interests of the coal business at Nashville, to treat all parties to this agreement in a fair and equitable manner, and to establish prices on coal at Nashville, Tenn., and to change same from time to time, as occasion may require." Prices to consumers at Nashville are to be established so as to sell coal at a fair and reasonable price, so as to allow all parties a fair profit for their product. Every person, firm or corporation owning or operating mines who ship coal to Nashville shall be eligible to membership in this exchange, and all coal dealers in the city of Nashville are also eligible to membership. None others are eligible. Any member of the exchange who may withdraw from it and continue in the coal trade in Nashville, or ship any coal to Nashville, shall forfeit and relinquish all interest of any and every kind, however obtained or accrued. The exchange will from time to time establish prices at which coal shall be sold in Nashville. Coal classed as No. 1 shall be valued at the mines at $4\frac{1}{2}$ cents minimum price of eighty pounds lump, and freight being 4 cents, and the dealer's margin to be $4\frac{1}{2}$ cents, making the price of lump coal 13 cents per bushel. No. 2 to be valued at 5 cents at the mine. No. 3 at 6 cents, and when the above prices are advanced in excess of the advance in freights, then one half the advance shall go to the mine owners and one half to the dealers. Every member found guilty of selling coal

at a less price than the price fixed by the exchange, either directly or indirectly, shall be fined 2 cents per bushel and \$10 for the first offense, and 4 cents per bushel and \$20 for the second offense. A majority of all the members shall constitute a quorum for the transaction of business.

Owners or operators of mines shall not sell or ship coal to any person, firm or corporation in Nashville, or West Nashville, or East Nashville, who are not members of the exchange, and dealers shall not buy coal from anyone not a member of the exchange. All coal used for manufacturing and steamboat purposes shall be exempt from prices made by the exchange until all mines tributary to this market shall become members of the exchange, or until the exchange can control prices to govern coal used by manufacturers. No coal shall be sold in any month to be delivered in any following month except at prices fixed for the particular month in which coal so sold is to be delivered. Fines and penalties are declared so as to enforce the stipulations embodied in the constitution and by-laws of the exchange.

It can hardly be denied that such provisions as these, by a body of persons such as compose this exchange, constitute a contract or combination in restraint of trade or commerce, or an attempt between different persons to monopolize a part of the trade or commerce between parties who are citizens of or reside in different states. It is shown that several mining companies in Kentucky engaged in raising coal, and most of the coal dealers of Nashville, Tenn., have entered into the foregoing mentioned arrangement. It is insisted for the defendants that the subject of agreement is not interstate commerce; that the obligation as to the mining companies ends at the mines. The price is fixed and paid at that point, and consequently controversies in regard to the contract as to them belong exclusively to the courts of the State of Kentucky; that so far as the dealers are concerned the price of the coal is fixed for its sale at Nashville, and after it becomes their property by delivery to them, and therefore the courts of Tennessee have the jurisdiction as to them. Various authorities are cited, and the debates in the Senate of the United States are read to sustain this view of the case. As I understand the contention of defendant's counsel it is that the agreement is

not violative of the terms of the Act of July 2, 1890. But if it is the Act is unconstitutional; first, because the Constitution confers upon the courts of the United States in such a case jurisdiction over "controversies between citizens of different states." That the fact that parties to a contract are citizens of different states does not confer jurisdiction. There must be a controversy between the parties to the contract, and this litigation is not a dispute between the contracting parties, but between the government and these parties. Second, that the Act creates and defines criminal offenses, and the Constitution provides that the "trial of all crimes except in cases of impeachment shall be by jury, and that section 4 of the Act, so far as it attempts to give circuit courts of the United States equitable jurisdiction over the violations of the Act, is unconstitutional. It is insisted the proceeding authorized is in substance an information in equity charging defendants with a misdemeanor.

I shall not enter into a discussion of the constitutionality of the law. A court, especially an inferior one, should hesitate long and consider carefully before it should declare an Act of Congress, passed after deliberation and debate and approved by the president, unconstitutional. The reasons for such a decision in such a case should be clear and undeniable. If doubtful or questionable the doubt should be resolved in favor of the law.

The arguments against the validity of the Act have been urged with great plausibility and strength, and an army of authorities have been read as sustaining the views of defendant's counsel. The positions of defendant's counsel have been met with equal force and ability by those representing the government, and many authorities have been referred to in support of the power of Congress to pass the law; and without nicely adjusting and weighing the opposing views of counsel, enough appears to prevent me from declaring the Act, or any part of it, as outside of the powers granted to Congress by the Constitution.

The remaining question is whether the agreement and regulations between the defendants are a "contract or combination in restraint of trade or commerce between states;" are they evidence of a combination to monopolize "any part of the trade or commerce" between the states of Tennessee and Kentucky. The

coal mines are in Kentucky, and the coal is to be mined there for a certain price, and the agreement contemplates its shipment to Nashville. To be sure it is not to be transported thither by the defendants or any of them, but the price for which it is to be shipped is fixed or stated, and becomes a part of the price for which the coal is to be sold at Nashville; and when the prices fixed "are advanced in excess of the advance in freights, the one half of the advance shall go to the mine owners and one half to the dealers." In making the agreement the transportation of the coal from Kentucky to Nashville was a necessary incident to and element in the arrangement, and its execution would have been impossible without it. The instrumentality of transportation did not belong to, nor was it controlled by them, but it was used by them and paid by them for services rendered. The contract provided for the sale of coal in Kentucky, its shipment to Nashville, Tenn., to dealers there, for its retail to consumers. It was to all intents and purposes a traffic trade, commerce between states.

Was the purpose of the exchange to monopolize a part of this trade, or to combine in restraint thereof? The exchange does not propose to be governed and controlled by the public markets arising from competition and the operations of the laws of supply and demand. On the contrary, it announces that its purpose is "to establish prices on coal at Nashville, Tenn., and to change the same from time to time as occasion may require," and in carrying out this object it asserts that "the exchange will establish prices at which coal shall be sold in Nashville, subject, however, to the following conditions and bases: Coal classed as No. 1 to be valued at the mines at 4 cents, minimum price, per bushel of eighty-five pounds for lump, and freight being 4 cents, the dealer's margin to be $4\frac{1}{2}$ cents, making the price of lump coal 13 cents per bushel; No. 2 to be valued at 5 cents at the mines; No. 3, 6 cents; and when the above prices are advanced in excess of the advance freights, the one half of the advance shall go to the mine owners and one half to the dealers." "Any member found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, shall be fined 2 cents per bushel and \$10 for the first offense, and 4 cents a bushel and \$20 for the second offense." These provisions, so far as this combination could do

so, fixed the lowest price of coal to consumers in and near Nashville at 13 cents per bushel and prevented coal being sold there at a cheaper rate, no matter how much less it might cost in an open and unobstructed market. Nor is this all. The exchange ordains that "owners or operators of mines shall not sell or ship coal to any firm, person or corporation in Nashville or West Nashville or East Nashville who are not members of this exchange, and dealers shall not buy coal from anyone who is not a member of the exchange." The coal trade is confined to dealings, so far as the market supply is concerned, to transactions between the miner and dealer; the prices are fixed by them and the miner and dealer only are eligible to membership. The miners of the concern cannot sell to any dealer in or near Nashville who is not a party to the agreement, nor can such dealer purchase coal of any miner anywhere who is not a member of the body. The operations of both are confined within the membership. So far as Nashville is concerned, they cannot go to cheaper or more favorable markets, or deal with those who would give more favorable terms. The restraint is positive and undeniable. Moreover, in the first section of the by-laws of the exchange it is asserted that "all coal used for manufacturing and steamboat purposes shall be exempt from prices made by this exchange until all mines tributary to this market shall become members of the exchange, or until the exchange can control prices to govern coal used by manufacturers." This clearly indicates the purpose of the association to be to control the price of coal in the Nashville market used in manufacturing and in steamboats, whenever it could; that the mines of coal, tributary to Nashville were all expected to become members of the exchange, whereupon the prices of coal could be fixed absolutely, and the necessary inference from this declaration and the entire organic structure of the body is that it felt strong enough already to regulate and establish the prices of domestic coal in that market, to a large extent at least, and that this exchange might now monopolize the business of dealing in domestic coal in the Nashville market, and in the future monopolize by and confine to its membership the entire trade in coal at that point. It seems to me that the purpose and intentions of the association could hardly have been more successfully framed to fall within the provisions

of the Act of July 2, 1890, had the object been to organize a combination, the business of which should subject it to the penalties of that statute, and that there is no need of authorities to sustain such view of the case. Regarding the Act as constitutional, I see no way for the defendants to escape its condemnation.

Proof has been taken, on the one hand, to establish that the people of Nashville have been and are being injured by the high prices which have been and are being paid for coal, and the extent of the injury. On the other hand, defendants have introduced proof to show that the higher freight rates to Nashville and the want of facilities for transportation by railroad and water are the causes for the higher prices of coal at Nashville than at Louisville or Memphis, but it is needless to enter upon this branch of dispute. "The attempt to monopolize or combine" is denounced by the second section of the Act, and the first section, "every contract or combination in restraint of trade or commerce among the several states." The attempt, the contract to do the thing prohibited, is enough to incur the penalties of this law.

I conclude that the defendants, by the organization of the Nashville Coal Exchange, and their operations under it, have been, and at the time of filing the petition in this cause were, guilty of a violation of sections 1 and 2 of the Act of July 2, 1890, and should be enjoined from further violations of the law, as provided by the fourth section thereof.¹

§ 53. Effect of Constitutional Provisions Regarding Monopolies.—Although there may be no direct constitutional provisions against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the usual Bill of Rights, which declares in some form in effect that no man or set of men is entitled to exclusive public emoluments or privileges from the community, to render them void. The Statute of 21 James I., chap. 3, declares such monopolies to be contrary to law and void.²

¹ *United States v. Jellico Mountain Coke & Coal Co.* 12 L. R. A. 753, 46 Fed. Rep. 482.

² Bacon, Abr. p. 764, title *Monopoly*; 4 Bl. Com. 160; 3 Coke, Inst. 181; Hindmarch, Patents, chap. 2, p. 7 *et seq.*; note to *Montgomery Gaslight Co. v. Montgomery* (Ala.) 4 L. R. A. 616; *Slaughter House Cases*, 83 U. S. 16 Wall. 101, 21 L. ed. 417; *Chenango Bridge Co. v. Binghamton Bridge Co.* (Binghamton Bridge) 70 U. S. 8 Wall. 51, 75, 18 L. ed. 137, 143; *Stein v. Bienville Water Supply Co.* 141 U. S. 67, 35 L. ed. 622.

The public policy of a State may be indicated by the provisions of its Constitution as related to past and present legislation.

In *New Orleans Gas Light Co. v. Louisiana L. & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, a gas company had been given, in 1835, the exclusive privilege of making and selling gas in New Orleans for some fifty years, and the question was whether such exclusive privilege was abrogated by the new Constitution of 1879, which contained a provision abolishing the monopoly features in all existing charters. The United States Supreme Court said in that case: "The monopoly clause only evinces a purpose to reverse the policy, previously pursued, of granting to private corporations franchises, accompanied by exclusive privileges, as a means of accomplishing public objects."

In states, therefore, where the Constitution has by amendment prohibited the granting of special charters to corporations, the policy as opposed to monopolies of every description is clearly thereby indicated, and courts must give effect to this policy by refusing to recognize the legal existence of corporations formed under general laws for the purpose of purchasing the controlling stock in corporations which are engaged in competing for public favor and patronage. If one great corporation, whether formed for the purpose, or deviating from its legal objects, may purchase the controlling interest in other corporations and manage them as one, all the purposes of the constitutional provisions against monopoly are subverted, and the courts in aiding the evasion of the constitutional prohibition become parties to the crime.¹

Where the state Constitution provides substantially, as it does in many of the states, that the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens, it follows as a general rule that, acting under such a constitution, neither the State nor a municipal government can grant or create a monopoly, as the express spirit and policy of the law forbid either from creating monopolies by favoring one corporation to the exclusion of another.²

But it must not be understood that all monopolies are included

¹*People v. Chicago Gas Trust Co.* 8 L. R. A. 497, 130 Ill. 268.

²*Citizens Gas & Min. Co. v. Elwood*, 14 West. Rep. 92, 114 Ind. 332.

in this prohibition and made thereby unlawful. Many things which are lawful are, from their nature and of necessity, monopolies, such are patent rights, copyrights, the right to keep a ferry, and many other things which might be mentioned.

Thus it is probably true that a municipal corporation may make a contract with a gas company for supplying light to the public lamps under such a constitutional provision, even though it be for a number of years.¹

As a street railroad company has no legal right to lay its track upon the streets of a city without the permission of the common council, if the city should grant such right to one company and refuse to grant it to another, the company to which the right was granted would have a monopoly, until such time as the common council should grant a similar right to some other person or company. So if the common council should grant to a street railroad company the right to lay its track on certain streets which were too narrow to admit of being occupied by other street railroad tracks, such company would have a monopoly of such streets. It is plain, therefore, that while monopolies, as a general rule, both at common law, on principle, and by statute, as violative of constitutional provisions and limitations, are unlawful, there are many exceptions to the rule. The rule applies only to such things as are of common right, and is never to be applied to such things as are in their nature a monopoly.

Judge Elliott, in his valuable work on Roads and Streets, in discussing this question at page 566, says: "To deny the power of the Legislature to make a grant that is of necessity of a monopolistic character would lead to the unwarranted conclusion that in no case can the Legislature grant the right to lay or operate a street railway in a road, or street; for, if the power to make such grant be conceded, it necessarily and unavoidably results that the occupancy of the part of the road or street is exclusive, as two railways cannot occupy the same space."

It is held in many reputable authorities that an exclusive

¹*Citizens Gas & Min. Co. v. Elwood*, 14 West. Rep. 92, 114 Ind. 332; and also with a corporation to supply water to a city, *Vincennes v. Callender*, 86 Ind. 484.

right in such cases may be granted for a reasonable and fixed period.¹

But there are also authorities which under such a constitutional provision deny this power.²

In many of the states articles forbidding monopolies have been incorporated in the amended constitutions, and in others, statutes have been enacted for the same purpose.

Monopolies are in denial of common right, and are unconstitutional and void.³ The idea has been expressed that granting such a privilege is a violation of the Fourteenth Amendment of the Constitution of the United States.⁴ And it is said that under the Fourteenth Amendment every citizen of the United States should be able to plead his citizenship of the Republic as a protection against any similar invasion of his privileges and immunities.⁵ It was early held that they are contrary to public policy.⁶ Where there is restraint on the one hand, there is monopoly on the other, and monopolies are odious to the law.⁷ The dangerous nature of monopoly has become not only more apparent as commerce has increased, but in fact more real. The danger to be apprehended from the accumulation of wealth and power in the hands of uneducated and unscrupulous individuals and great corporations, and the abuses by which large capitalists under corporate

¹*New Orleans Gas Light Co. v. Louisiana L. & H. P. & Mfg. Co.* 115 U. S. 650; 29 L. ed. 516; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 664, 29 L. ed. 525; *Des Moines St. R. Co. v. Des Moines, B. G. St. R. Co.* 78 Iowa, 518; *St. Tammany Water Works Co. v. New Orleans Water Works Co.* 120 U. S. 64, 30 L. ed. 563. See *Indianapolis Cable St. R. Co. v. Citizens St. R. Co.* 8 L. R. A. 539, 127 Ind. 389; *Evans v. Hughes County*, 6 Dak. 102.

²See *Citizens Gas & Min. Co. v. Elwood*, 14 West. Rep. 93, 114 Ind. 332; *Macon & B. R. Co. v. Stamps* (Ga.) 11 S. E. Rep. 442; *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.* 34 W. Va. 155; *Kalamazoo Hack & B. Co. v. Sootema*, 10 L. R. A. 819, 84 Mich. 194.

³*Norwich Gas Light Co. v. Norwich City Gas Co.* 25 Conn. 19; *Chicago v. Rumpff*, 45 Ill. 90; *Hudson v. Thorne*, 7 Paige, 261, 4 L. ed. 148; *Slaughter House Cases*, 83 U. S. 16 Wall. 102, 21 L. ed. 417; *Re Richmond Retail Coal Co.*, Pa. 9 Ry. & Corp. L. J. 81.

⁴*Live Stock D. & B. Assn. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388.

⁵*Slaughter-House Cases*, 83 U. S. 16 Wall. 105, 21 L. ed. 418.

⁶*Rex v. Waddington*, 1 East, 167; *Case of the Monopolies*, 11 Coke, 84 b.

⁷*Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; *Craft v. McConoughy*, 79 Ill. 346; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160.

cover may so combine as to relax or destroy competition in trade, are matters of public concern, and the essential question is one of monopoly producing injury to the public.¹ A contract which creates a monopoly is void as in violation of a Constitution, which declares that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." If such is the effect of any contract, it is unlawful as forbidden by the Constitution, and no legislation can give validity to it.² There are three inseparable results to every monopoly: (1) that the price of the same commodity will be raised; (2) that after the grant the commodity is not so good and marketable as before; (3) that it tends to impoverishment of divers artisans, artificers and others.³ An exclusive privilege granted to a few individuals, not for the public good, but for their own interests and their successors incorporated into a society, and prohibiting all others from exercising the same privilege, violates the fundamental rights of citizens willing to conform to the constitutional regulations and restrictions of business.⁴

§ 54. **Combinations Tending to Impede Competition, Illegal.**—Without rivalry trade will languish, and the enterprise, thrift and welfare of the people disappear. Legitimate business aims to acquire competence or perhaps moderate wealth, by honest labor, toil and frugality. Monopoly seeks to suppress the competition which naturally only produces such results, and substitutes combination among producers to reduce production, and enhance prices without the corresponding toil of production. All combinations which propose or may in fact tend to impede free and fair competition in trade are therefore illegal and void as being against public policy.⁵

¹*Skrainka v. Scharringhausen*, 8 Mo. App. 523.

²*Brenham v. Brenham Water Co.* 67 Tex. 561.

³*Case of the Monopolies*, 11 Coke, 87 a.

⁴*Slaughter-House Case*, 1 Woods, 21.

⁵*Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632; *Gibbs v. Consolidated Gas Co.* 130 U. S. 896, 32 L. ed. 979; *Schofield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 812, 48 Ohio St. 571; *Louisville, N. A. & O. R. Co. v. Sumner*, 2 West. Rep. 663, 106 Ind. 55; *Chicago Gaslight & C. Co. v. People's Gaslight & C. Co.* 11 West. Rep. 63, 121 Ill. 530.

All agreements, in whatever form, to stifle fair competition are void.¹

Bargains devised to compel individuals or corporations to pay undue prices for anything, or to create a monopoly, are void.²

All contracts having a tendency to stifle competition or to create or foster monopolies, with a view unreasonably to increase the market value of commodities, are void as against public policy and cannot be enforced.³

A contract in restraint of trade to the injury of others and tending to monopoly, extortion and oppression is void as against public policy.⁴

If the object of a contract is to prevent or impede free and fair competition in trade, and it may in fact have that tendency, it is void as being against public policy.⁵

A contract entered into by the grain dealers of a town which, on its face, indicates that they have formed a partnership for the purpose of dealing in grain, but the true object of which is to form a secret combination which would stifle all competition and enable the parties, by secret and fraudulent means, to control the price of grain, costs of storage, and expense of shipment at such town, is in restraint of trade, and consequently void on the ground of public policy.

While these parties were in business, in competition, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They would pay as high or low a price for grain as they saw proper and as they could make contracts with the producer. So long as competition was

¹*Gardiner v. Morse*, 25 Me. 140; *James v. Fulcrud*, 5 Tex. 512; *Hunt v. Frost*, 4 Cush. 54; *Hook v. Turner*, 22 Mo. 883; *Jones v. Caswell*, 3 Johns. Cas. 29; *Thompson v. Davies*, 13 Johns. 112; *Ingram v. Ingram*, 49 N. C. 188; *Martin v. Ranlett*, 5 Rich. L. 541; *Brisbane v. Adams*, 3 N. Y. 129; *Atcheson v. Mallon*, 48 N. Y. 147; *Gibbs v. Smith*, 115 Mass. 592; *Marsh v. Chicago, R. I. & P. R. Co.* 75 Iowa, 361.

²*Marsh v. Russell*, 66 N. Y. 288; *Kelly v. Devlin*, 58 How. Pr. 487; *Woodruff v. Berry*, 40 Ark. 251; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 484.

³*Texas & P. R. Co. v. Southern P. R. Co.* 41 La. Ann. 970, 40 Am. & Eng. R. Cas. 475; *Emery v. Ohio Candle Co.* 47 Ohio St. 820; *State v. Nebraska Distilling Co.* 29 Neb. 700, 29 Am. & Eng. R. Cas. 656.

⁴*Schofield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 827, 43 Ohio St. 571; *Louisville, N. A. & O. R. Co. v. Sumner*, 2 West. Rep. 665, 106 Ind. 55.

⁵*Anderson v. Jett* (Ky.) 6 L. R. A. 390.

free the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly, against which the public interest had no protection.¹

The possibility that other business enterprises in the same pursuit may be set on foot to counteract the effect of a combination to control the market in a commodity will not relieve such combination of illegality.²

¹*Craft v. McConoughy*, 79 Ill. 346.

²*People v. North River Sugar Ref. Co.* 5 L. R. A. 387, 54 Hun, 354.

CHAPTER XI.

COMBINATIONS TO MONOPOLIZE.

§ 55. *Combinations in Various Disguises to Monopolize the Market.*

56. *Union of Corporations in a Partnership to Suppress Competition.*

57. *Combination between Corporations without Partnership.*

§ 55. **Combinations in Various Disguises to Monopolize the Market.**—These combinations assume various disguises. In some instances an association is formed for the manufacture of an article of ordinary domestic use. An enormous amount of capital is aggregated to purchase and absorb all manufactories of the article in the country and to prevent any other person or corporation from engaging in or carrying on the same, thereby preventing all competition in the sale of the article monopolized. Those manufacturers who will not enter into the scheme are bought out or crushed by temporarily supplying the market they cater to at prices below the cost of production. All who unite in the combination and all who are bought out are required to enter into bonds to the effect that they will not even indirectly engage in the production or sale of the article, nor aid nor encourage any one else to do so. All trade secrets are to be kept from the public and apprentices excluded from learning the art. Others proposing to engage in the production are frightened or bought off and the result is that one vast combination controls the production and sale of an article which may be used in every family, and perhaps necessary to the comfort and convenience of the people. Its price is thereafter to be fixed by the selfish greed of the combination.

This price must not only pay an extravagant profit on production, but it must also reimburse the combination for all the money spent in the purchase of plants, and machinery, which the necessity of paralyzing competition has induced, and which will thereafter be idle, if not destroyed. It must also repay the money

expended to induce active labor to live thereafter in idleness, or in less remunerative occupation, and thus the public must pay not only an unreasonable profit upon the manufacture of the monopolized article, but must pay for the costly destruction of the implements of honest industry and the support of enforced idleness, and of an increased non-producing class. It must pay for the destruction of all the means it possessed to relieve itself from the impositions of the monopoly. When such a case was presented in the Supreme Court of Michigan in *Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632, and counsel on each side refused to raise the question of illegality, the court on its own motion took notice of the crime against the community and denied relief, declaring that courts will take notice on their own motion of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves; that the organization of a corporation for the purpose of controlling the manufacture and trade in matches in the United States and Canada, by inducing all manufacturers of matches to enter into a combination securing to such corporation the whole control of the business, or by buying out those who would not so enter, and buying off any others who might propose to engage in the business, is an unlawful enterprise, being an attempt to create a monopoly; and that an agreement intended to aid in the formation and organization of an illegal corporation designed to secure a monopoly of a certain business by which, in consideration of indorsements and other financial aid to a shareholder to enable him to raise funds necessary to join the enterprise, the indorsers are to have a share of the net earnings of his stock, is void on grounds of public policy.

It is true that the tendency of the union of private capital in corporate freedom, has been to promote competition in great undertakings, where combined wealth and energy are demanded. Vast enterprises, with attending risks and perils, are ventured on when the extreme limit of loss is only the corporate capital invested, with no hazard to private fortunes, and neither the fear of physical death, nor commercial or moral ruin deter the artificial being, if the prize at stake be sufficient. The results of such corporate activity and courage are the vast development of manufacturing, farming and mining interests and of carrier transportation.

Working in harmony, the carrier transfers the product of the farm, the loom and the furnace to the most profitable market, and millions thus enjoy what, if individual enterprise were alone acting, the few only could share.¹

Universal distribution of production enlarges the market and promotes consumption. It reduces cost and it opens fields of new activity. It is to the freedom of corporate existence that much of the present commercial prosperity is owing. Like individual combination for lawful pursuit, corporate combination for like purposes is to be approved, and it is followed by equally beneficent results. Connecting lines of transportation by union in running arrangements, cheapens the tariff of charges. So long as competition is open, combination of individuals in partnership or corporate effort is harmless to the public. But even competition may become in itself an evil,² and pooling the earnings of competing roads, where the sole purpose is to prevent ruinous competition, and not attempting to increase the rate for transportation beyond a reasonable amount for the service rendered, is not in any true sense inimical to public policy. The charges for freight do not generally in fact seem to be regulated by the cost of the road or its equipment, but rather by the rate that can be paid profitably by the article transported to market. Where the purpose is honest and to save from destruction valuable property, through reckless competition, there can be no legitimate complaint against pooling the earnings of competing roads or of rival manufacturers.³

But courts decline to enforce such pooling contracts, leaving the

¹*East India Co. v. Sandys*, 10 How. St. Tr. 371; *Ontario Salt Co. v. Merchants Salt Co.* 18 Grant, Ch. U. C. 540; *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476; *Wickens v. Evans*, 3 Young & J. 318.

²*Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519.

³*Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 9 L. R. A. 689; *Kelsey v. Pfaucler P. F. Co.* 45 Hun, 15; *Gloucester I. & G. Co. v. Russia Cement Co.* (Mass.) 12 L. R. A. 568; Letter of Blanchard, Chairman Central Traffic Asso. to Chairman U. S. Senate Committee on Interstate Commerce, 8 Ry. & Corp. L. J. 1; *Benedict v. Western U. Teleph. Co.* 9 Abb. N. C. 214; *Union Mut. Ins. Co. v. Union Mills Plaster Co.* 3 L. R. A. 90, 37 Fed. Rep. 286; *Hare v. London & N. W. R. Co.* 2 Johns. & H. 90; *Lancaster & C. R. Co. v. North Western R. Co.* 2 Kay & J. 298; Opinion Clarence A. Seward, 7 Ry. & Corp. L. J. 261, 5 Ry. & Corp. L. J. 218; *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519; *Ives v. Smith*, 28 N. Y. S. R. 917; *Pittsburg Carbon Co. v. McMillin*, 53 Hun, 67; *Metropolitan Teleph. & Teleph. Co. v. Domestic Teleph. & Teleph. Co.* 44 N. J. Eq. 568; *Pacific Factory Co. v. Adler*, 90 Cal. 110. Note to *National Benefit Co. v. Union Hospital Co.* (Minn.) 11 L. R. A. 437.

parties to work out their own delivery from an engagement liable to abuse, and to be used as an instrument of oppression against the public.¹

The court will not assist the plaintiff to get payment for efforts to accomplish what the law declares should not be done.²

While it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract,³ yet, in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy.⁴

An agreement or combination between sugar refining companies, creating a partnership for the purpose of monopolizing the manufacture and sale of refined sugar, being an illegal contract created for an unlawful object, will not be enforced by the courts.⁵

"Cases must be judged according to their circumstances," remarked *Mr. Justice Bradley* in *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 68, 22 L. ed. 315, 318, "and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself, by being precluded from pursuing his occu-

¹*Hoffman v. Brooks*, 11 Week. L. Bul. 258; *Texas & P. R. Co. v. Southern Pac. R. Co.* 41 La. Ann. 970; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 644, 32 L. ed. 819; *Jackson v. McLean*, 86 Fed. Rep. 213; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Santa Clara Valley M. & L. Co. v. Hayes*, 76 Cal. 887; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178; *Craft v. McConoughy*, 79 Ill. 346.

²*Gibbs v. Consolidated Gas Co.* 180 U. S. 396, 32 L. ed. 979.

³*Printing & N. R. Co. v. Sampson*, L. R. 19 Eq. 462.

⁴*Stanton v. Allen*, 5 Denio, 484; *Grasselli v. Lowden*, 11 Ohio St. 849; *Hilton v. Eckersley*, 6 El. & Bl. 47; *Central Ohio Salt Co. v. Guthrie*, 85 Ohio St. 666; *McBernie v. White Lead Co.* 9 Week. L. Bul. 810; *Crawford v. Wick*, 18 Ohio St. 190. This subject is much considered, and the authorities cited in *West Virginia Transp. Co. v. Ohio River P. L. Co.* 22 W. Va. 600; *Chicago Gaslight & C. Co. v. People's Gaslight & C. Co.* 11 West. Rep. 63, 121 Ill. 580; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160.

⁵*Gray v. Ozard Bros. Co.* 81 N. Y. S. R. 968.

pation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced."

Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or quasi public character, which are manifestly prejudicial to the public interest, cannot be upheld. And presumptively an agreement between two competing systems of railroads to divide their earnings for traffic between given points, for which they were previously competitors, is against public policy and cannot be enforced.¹

The law "cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law. So that, in short, all stipulations to overturn, or in evasion of what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the courts have defined; all made to promote what a statute had declared to be wrong,—are void."²

It is also too well settled to admit of doubt that a corporation

¹*Texas & P. R. Co. v. Southern P. R. Co.* 41 La. Ann. 970, 40 Am. & Eng. R. Cas. 475.

²*Bishop, Contracts*, § 549; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 644, 33 L. ed. 819; opinion by Mr. Justice Field; *Trist v. Child*, 88 U. S. 21 Wall. 441, 22 L. ed. 628; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 568; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 686; *Woodruff v. Berry*, 40 Ark. 261; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411; *Craft v. McConoughy*, 79 Ill. 346; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Central R. Co. v. Collins*, 40 Ga. 582; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173.

cannot by its own voluntary act disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests.¹

"Where," says *Mr. Justice Miller*, delivering the opinion of the court in *Thomas v. West Jersey R. Co.* 101 U. S. 71, 83, 25 L. ed. 950, 952, "a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

But as neither human sympathy, moral principle, personal reputation, nor the fear of punishment have deterred individuals from forming combinations and conspiracies to control and stifle competition, so the temptation to use such combinations for purposes of exacting unlawful tribute has often proved irresistible, where there was neither a soul to save, a body to imprison for corporate crime, nor personal self-respect to sacrifice. And it has been held that the organization of a corporation for the purpose of controlling the manufacture and trade in an article of commerce in the United States and Canada, by getting all manufacturers of such article to enter into a combination giving such corporation the whole control of the business, or by buying out those who would not enter, and buying off any others who might propose to engage in the business,—is an unlawful enterprise, being an attempt to create a monopoly; and that an agreement intended to aid in the formation and organization of an illegal corporation designed to secure a monopoly of a certain business, by which, and in consideration of indorsements and other financial aid to a shareholder to enable him to raise funds necessary to join the enterprise, the indorsers are to

¹*Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 83 L. ed. 979; *West v. Camden*, 135 U. S. 507, 84 L. ed. 254; *East Tennessee, V. & G. R. Co. v. Frazier*, 139 U. S. 288.

have a share of the net earnings of stock, is void on grounds of public policy.¹

§ 56. **Union of Corporations in a Partnership to Suppress Competition.**—Another form with which such combinations are clothed is that of a union of corporations in a partnership for a division among them of the profits upon the production and sale of some article, placed under the control of the partnership, or a division of the charges upon transportation by carriers. But the law does not favor such arrangements, and the general rule is that corporations cannot enter into a partnership agreement pooling all their earnings, the business being managed for them by representatives appointed, and the profits distributed among the partners, unless specially authorized by statute.² And it was held by the supreme court of New York that the uniting of corporations into a particular consolidation or partnership, not authorized by their charters or effected under statutes in reference to consolidation of corporations, is *ultra vires*, and if it destroy the purpose of their creation, warrants the forfeiture of their corporate existence.

Such combinations have frequently been condemned by courts as not only unlawful but against public policy.³

A corporation is a new creature of the law, deriving all its powers from the Act incorporating it, and can exercise the same only in the manner therein authorized.⁴

A contract between corporations charged with a public duty, such as that of common carriers, providing for the formation of a combination having no other purpose than that of stifling competition and providing means to accomplish that object, is illegal and against public policy.⁵

¹*Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632.

²*Central R. & Bkg. Co. v. Smith*, 76 Ala. 572; *Charlton v. Newcastle & C. R. Co.* 5 Jur. N. S. 1097; *Gunn v. Central R. Co.* 74 Ga. 509; *Elevator Co. v. Memphis & O. R. Co.* 85 Tenn. 708; *Mallory v. Hanau Oil Works*, 86 Tenn. 598; *Whittenton Mills v. Upton*, 10 Gray, 582, 71 Am. Dec. 685; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950.

³*Craft v. McConoughy*, 79 Ill. 346; *Alger v. Thacher*, 19 Pick. 51; *Hannah v. Fife*, 27 Mich. 172; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Hoffman v. Brooks*, 11 Cin. W. L. Bul. 258; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 672; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 186.

⁴*Head v. Providence Ins. Co.* 6 U. S. 2 Cranch, 127, 2 L. ed. 229; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 826, 4 L. ed. 656.

⁵*Cleveland, O. C. & I. R. Co. v. Closser*, 9 L. R. A. 754, 126 Ind. 348.

A resolution to deliver the stock of a corporation to trustees of a certain association or combination, which is carried unanimously by the votes of all who are present, including every member of the trustees of the corporation and all the shareholders except two, who own but a small part of the stock and who are stated in fact to have consented to the delivery of the stock, is sufficient to make the corporation a party to the combination. And where a manufacturing corporation which, instead of manufacturing its product and disposing of it to the public on what might be fair competitive prices, becomes a party to a combination in part at least designed to create a monopoly and exact from the public prices which could not be otherwise obtained, is liable to have its charter vacated and annulled for such subversion of the object for which it was created.¹

The Court of Appeals rested its affirmation of the decision in *People v. North River Sugar Ref. Co.* on the sole ground that it was unlawful for the corporation to enter into a partnership agreement which in fact consolidated the corporations,² the court simply declining to decide any other question in the case.³

The fact that the control of a corporation is by its charter vested in a board of directors, seems to preclude such corporation from placing itself by contract in relations with other corporations or individuals, which may involve liabilities not assumed by its constituted authorities.⁴

But there are cases where corporations enter into contracts, which would amount to partnerships if between individuals, and which, whether with other corporations, or with individuals, are in fact in the line of the corporate purpose. Under such circumstances,

¹*People v. North River Sugar Ref. Co.* 5 L. R. A. 387, 54 Hun, 354, 22 Abb. N. C. 164.

²*People v. North River Sugar Ref. Co.* 9 L. R. A. 33, 121 N. Y. 582.

³See on this question as denying the power to unite in partnership, *Catskill Bank v. Gray*, 14 Barb. 479; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598; *Gunn v. Central R. Co.* 74 Ga. 509; *Whittenton Mills v. Upton*, 10 Gray, 582, 71 Am. Dec. 681; *Holmes v. Old Colony R. Co.* 5 Gray, 58; *Jones v. Parker*, 20 N. H. 31, 20 Am. & Eng. Corp. Cas. 485; *Gill v. Manchester, S. & L. R. Co.* L. R. 8 Q. B. 186; *Central R. & Bkg. Co. v. Smith*, 76 Ala. 572; *Van Kuren v. Trenton L. & Mach. Mfg. Co.* 18 N. J. Eq. 302; *Lamouille Valley R. Co. v. Bizby*, 55 Vt. 235; *Leedsinger v. Central Line Steamers*, 75 Ga. 567; *French v. Donohue*, 29 Minn. 111; *Bissell v. Michigan S. & N. I. R. Co.* 22 N. Y. 258.

⁴*Whittenton Mills v. Upton*, 10 Gray, 582, 71 Am. Dec. 681; *New York & S. Canal Co. v. Fulton Bank*, 7 Wend. 412.

courts waiving the question of power to enter into a partnership contract, sustain the engagement as being within the object contemplated in the creation of the corporation.¹

Of course where the purpose of the creation of the corporation does not appear, an enterprise in which it may engage, even as a partner, cannot readily be shown to be inconsistent with the object of its creation.²

But the courts are specially solicitous to discountenance all contracts or arrangements by these public servants which savor of a purpose to stifle competition or repress rivalry in the departments of business in which they ply their vocation.³

It has been denied that courts can reach "trusts," where they exist under partnerships; it being claimed that partnerships cannot be restrained on the ground that their purpose is hostile to freedom of trade.⁴ But this is too broad an assertion. A partnership of that character is subject to the restraining power of the court. It is impossible under any form of contract to escape the control of a court of equity.⁵

§ 57. Combination between Corporations without Partnership.—It is undoubtedly true that agreements between corporations as to certain mutual interests may rightfully be entered into, without involving partnership liabilities, or constituting a contract of partnership. Under proper circumstances and lawful purposes, there may be a pooling of receipts without a partnership contract.⁶

¹*Marine Bank v. Ogden*, 29 Ill. 248; *Cleveland Paper Co. v. Courier Co.* 67 Mich. 152; *Rider L. Raft Co. v. Roach*, 97 N. Y. 878; *Hackett v. Multnoh R. Co.* 12 Or. 180; *French v. Donohue*, 29 Minn. 111; *Leggett v. Hyde*, 58 N. Y. 278; *Gill v. Manchester, S. & L. R. Co.* L. R. 8 Q. B. 186.

²*Shorb v. Beaudry*, 56 Cal. 446; *Allen v. Woonsocket Co.* 11 R. I. 288; *Butler v. American Toy Co.* 46 Conn. 186; *Dalton City Co. v. Dalton Mfg. Co.* 33 Ga. 243.

³*State v. Hartford & N. H. R. Co.* 29 Conn. 538; *Hooker v. Vandewater*, 4 Denio, 849; *Twells v. Pennsylvania R. Co.* (Pa.) 8 Am. L. Reg. N. S. 728; *Western U. Teleg. Co. v. Chicago & P. R. Co.* 86 Ill. 246; *Coe v. Louisville & N. R. Co.* 8 Fed. Rep. 775; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 644, 32 L. ed. 819; *Santa Clara M. & L. Co. v. Hayes*, 76 Cal. 287; *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 17 Fed. Rep. 667, and note by Hamilton.

⁴Dwight, *Trusts*, 3 Political Science Quarterly, 592.

⁵*Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632.

⁶*Briggs v. Vanderbilt*, 19 Barb. 222; *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519; *Converse v. Norwich & N. Y. Transp. Co.* 33 Conn. 166; *Pratt v. Ogdensburg & L. O. R. Co.* 102 Mass. 557; *Benedict v. Western U. Teleg.*

But where such combinations are made for the purpose of destroying competition, and imposing unnatural and unreasonable rates and charges upon the public, the fact that the corporations forming the combination do not enter into any partnership arrangement, will not relieve the contract in any way from its objectionable features as a monopoly.

Rival steamboat owners sometimes form an engagement to divide the profits of the carrying trade in a certain proportion without creating any partnership. The property rights and responsibilities of the owner or owners of each boat remain as before the arrangement is entered into. Neither assumes any duty or obligation to the other that he is not under before the contract is made, except that of pooling the net profits earned by each, and dividing them in certain proportions; but neither party is under any obligations to the other party to run his boat for a single day. Neither party is bound to keep his boat well manned or in good and safe condition. The only tie common to both is that of dividing the net profits. There is in such relations a strong stimulation to increase these net profits by means other than that of legitimate popularity with the public, resulting from efficient carrying service and public accommodation. If one boat can, no matter at what detriment and inconvenience to the public, perform the service, there is no inducement to the others to run. It is to the interest of each owner for the other boats to tie up, reducing expenses and increasing the net profits. It is to the interest of each to sustain extortionate rates, as each shares the spoil. The public are thus deprived of all competition and of any reasonable prospect of relief from extortionate charges, for if another boat enters the field, the boats of the combination are ready to cut prices below living rates.

Competition serves the public in securing prompt, efficient carriage, attentive, courteous treatment and reasonable prices. Without competition it is not in the "law of carriers" to enforce care for the safety and comfort of the public, with efficient service. Such a combination therefore between carriers is *prima facie* at least in direct conflict with public policy, and will not be sustained

Co. 9 Abb. N. C. 214; Lancaster & C. R. Co. v. North Western R. Co. 2 Kay & J. 298; Manchester & L. R. Co. v. Concord R. Co. (N. H.) 9 L. R. A. 689; Hare v. London & N. W. R. Co. 2 Johns. & H. 80.

by the courts.¹ And an agreement between the proprietors of five lines of canal boats to charge a uniform rate and divide the common earnings is condemned as a conspiracy.²

A contract arising out of such an agreement is illegal and void.³

But a combination which does not injuriously affect the public, cannot be set aside at common law, and without the aid of a statute, at the instance of an individual carrier, on the ground of special injury to him. Thus a combination of ship owners to keep trade in their own hands by giving a rebate on freights is not unlawful as to a rival carrier excluded therefrom.⁴

¹*Anderson v. Jett* (Ky.) 6 L. R. A. 390.

²*Hooker v. Vandewater*, 4 Denio, 349.

³*Stanton v. Allen*, 5 Denio, 484.

⁴*Mogul Steamship Co. v. McGregor*, L. R. 21 Q. B. Div. 544.

CHAPTER XII.

TRADE TRUSTS.

§ 58. *Right to Combine for Lawful Objects.*

a. *Car Trust.*

b. *Contracts among Corporations to Prevent Ruinous Competition.*

59. *Corporate Combinations to Prevent Fair Competition ; " Trade Trusts."*

60. *General Acts of Incorporation will not Authorize the Formation of Trusts.*

61. *Corporation Representing a Trust cannot Act in Foreign Territory without Local Authority.*

§ 58. **Right to Combine for Lawful Objects.**—It is the right, and perhaps it may be said to be the social duty of every man to work and produce in some lawful vocation, and it is equally his privilege to transport his production under equal terms and conditions and under like circumstances to the most profitable market. It is this unchallenged right to produce and sell in the best market which constitutes industrial liberty. Equally exists the right to combine and unite the labor or capital of individuals in a common venture. This right is recognized by the law of partnerships, which defines what are lawful partnerships,¹ and what do not constitute such.²

¹*Central R. & Bkg. Co. v. Smith*, 76 Ala. 572; *Dalton City Co. v. Dalton Mfg. Co.* 83 Ga. 248; *Pulcher's Succession*, 89 La. Ann. 362; *Kelley v. Bourne*, 15 Or. 476; *Clift v. Barrow*, 10 Cent. Rep. 715, 108 N. Y. 187; *Mallory v. Hannaur Oil Works*, 86 Tenn. 598; *Smith v. Walker*, 57 Mich. 456; *Paul v. Cullum*, 183 U. S. 589, 38 L. ed. 480; *Com. v. Smith*, 10 Allen, 448; *People v. North River Sugar Ref. Co.* 9 L. R. A. 88, 121 N. Y. 582; *Busard v. McAnulty*, 77 Tex. 488; *Charlton v. Newcastle & O. R. Co.* 5 Jur. N. S. 1097; *Marine Bank v. Ogden*, 29 Ill. 248; *Dubos v. Hoover*, 25 Fla. 720; *Ontario Salt Co. v. Merchants Salt Co.* 18 Grant Ch. 540; *Righter v. Farrel*, 184 Pa. 482; *Southern Fertilizer Co. v. Reams*, 105 N. C. 288; *Gill v. Manchester S. & L. R. Co.* L. R. 8 Q. B. 186.

²*Merchants Nat Bank v. Pendleton*, 29 N. Y. S. R. 891; *Clark v. Barnes*, 72 Iowa, 568; *Hackett v. Multnomah R. Co.* 12 Or. 129; *Rockafellow v. Miller*, 9 Cent. Rep. 862, 107 N. Y. 507; *Blair v. Schaeffer*, 88 Fed. Rep. 218; *Whittenton Mills v. Upton*, 10 Gray, 582; *Ledsinger v. Central Line Steamers*, 75 Ga. 567; *Busard v. First Nat. Bank of Greenville*, 67 Tex. 88; *Conkling*

Like the enterprise of the individual the pursuit entered upon by a partnership is open to all other partnerships, and this combination of individuals as partners in no way infringes upon industrial liberty. It simply aids production by increasing results at reduced expense. Such combinations are in no way opposed by the law. Nor is the union of labor and capital, in the recognized form of a corporation, to carry on any lawful business, opposed to public policy. Indeed in most of the states it can no longer be regarded as even in form a monopoly, much less in fact, for upon the same terms the right to form such corporate union is equally open to all and equally limited in its purpose and exercise by express statute.

a. Car Trust.—Such union of persons upon car trust plan is of modern date. The car trust plan, for the sale of railroad equipment, is simply to supply a company or individual with such equipment as may be wanted, on a basis of a small payment in cash at the time of delivery, and the balance, in amounts monthly, extending over a period that will result in the earning capacity of such equipment being equal to the monthly payment, and consequently avoiding the necessity of further advance on the original cost and it becomes the absolute property of the bailee, conditional vendee or lessee, after payment of all the monthly installments.

Insurance is effected by the "car trust" company for mutual protection, so that no serious loss results to the vendor.

The price charged for equipment on this plan, it is usually claimed, is the same as though sold on a cash basis.

From this price the "car trust" company usually deducts 25 per cent, to be paid in cash at the time of delivery, and to the balance adds an average of 6 per cent per annum interest, and a small commission for the use of the money, and the risk taken in the business, charged in proportion to the extent of the trust. The sum is then divided into equal amounts, payable monthly, over the desired time.

"Car trusts" are arranged on locomotives, passenger and street

v. Washington University, 2 Md. Ch. 497; *Fitzell v. Leaky*, 72 Cal. 477; *Noonan v. Nunan*, 76 Cal. 44; *Wilson v. Edmonds*, 180 U. S. 472, 82 L. ed. 1025; *Durkes v. Gunn*, 41 Kan. 496; *Hall v. Glessner*, 100 Mo. 155; *Morgan v. Farrel*, 58 Conn. 418.

railway equipment, new or second hand, and in some cases on rails and track material.

The essential features of a "car trust association" consist usually of the formation of a partnership by an instrument of writing, for the purpose of buying, selling and leasing railroad stock to railroad corporations.

These articles of association usually provide for admitting other persons to membership, who may acquire, by assignment, the interest held by individuals on the original formation of the partnership.

The members of a "car trust" agree to furnish money for the purchase of the rolling stock, and receive certificates for the amount so furnished, providing that the principal sum contributed by each member shall be repaid in certain annual installments, with interest; both principal and interest, where the form of lease is adopted in preference to that of sale, being payable only out of what are called the rentals received for the rolling stock.

Under some forms of management instead of the lease, as it is called, being made to the railroad company directly by the "car trust," a plan is adopted by which the "car trust" transfers the property to a designated loan and trust company as trustee; which trustee issues certificates to the members of the "car trust," and also executes the lease to the railroad company, with provisions for a rental sufficient to meet the above payments of principal and interest in addition to expenses, including taxes. In this manner, the railroad company obtaining what is called a lease of the railroad equipment, becomes bound according to the terms of the lease to make payments which in the course of the existence of the lease will discharge in full the debt for the rolling stock, on which payment the rolling stock becomes the property of the railroad company.

At all meetings every shareholder is to have one vote for each share of stock owned by him; and provision is made in the articles of association for the transfer of shares, and the association is not to be dissolved upon death of the members. Every owner of one or more shares is to be entitled to a proportionate share of rentals received. The losses, if any, must be borne proportionately.

In the articles organizing such associations there are provisions

made looking to the purchase of rolling stock from time to time, and to the issue of new certificates to those who shall advance the money on the occasion of each purchase, and to the making of a new and separate lease on each lot or series of rolling stock.

As such new certificates may be issued to different persons from those who have contributed money for the first purchase, it would seem that the holders of each series or separate issue of shares, would, in such a case, constitute a partnership by themselves under the same provisions of management, where there is no intermediate form between a corporation and a partnership, like the joint stock companies of England and of some of the United States. In such cases, where the association is not a corporation, its members must be partners, for they cannot be looked upon as simply co-owners.¹

Where it is permissible under the local statute, the articles of agreement provide, among other things, that only the property of the association shall be liable for its debts; the members not to be liable individually; and the affairs of the association are controlled by a committee chosen from the members.

Frequently the association contracts directly with the railroad company desiring equipment, usually under the form of a lease, with a cash payment upon the delivery of the rolling stock and monthly payments thereafter, extending from one to three years, and amounting to the actual value of the equipment furnished, with a sufficient margin added to cover the interest and risk incurred. It is usually stipulated that the title shall remain in the vendor until the payment is completed.

The railroad company executes a contract authorizing the car trust association to take possession of the property, upon the failure of the railroad company to pay its installments, or to keep the rolling stock in reasonable repair; and, in such case, the property is to be sold for the indebtedness remaining due and the account settled between the railroad company and the car trust association.

Occasionally these contracts take the form, on their face, of a conditional sale or with lien reserved. But, in all instances, the

¹ *Whitman v. Porter*, 107 Mass. 522; *Hoadley v. Middlesex County Comrs.* 105 Mass. 519; *Gleason v. McKay*, 134 Mass. 419-425; *Ricker v. American Loan & T. Co.* 1 New Eng. Rep. 733, 140 Mass. 346.

railroad company executes its notes, which are variously styled, lease warrants, promissory notes, or debentures, the whole transaction forming what is commonly known as a car trust contract, which is transferred by the car trust association to the trustee, who indorses upon the lease warrants, notes or debentures that he holds, the contract as security for their payment.

In other instances the car trust association executes its own debentures, depositing the contract, with the notes or lease warrants given under it, with a trustee. In Pennsylvania the present sale or delivery of personal property to the vendee, coupled with an agreement that the title shall not vest in the latter unless he pays the price agreed upon, at the time appointed therefor, and that in default of such payment the vendor may recover possession of the property, is held to be quite different in its effect from a bailment for use, or, as it is sometimes called, a lease of property coupled with an agreement whereby the lessee may subsequently become the owner of the property, upon the payment of the price agreed upon. It is there ruled that, as between the parties to such contracts, both are valid and binding, but, as to the creditors, the latter is good while the former is invalid.¹

The ruling in Alabama is consistent with this rule.² But in a late case the Supreme Court of Pennsylvania has decided that where the property is said to be "leased" for a certain gross sum, with the stipulation that the title shall remain in the vendor until full payment of that sum, with a condition that possession shall revert to the vendor on any default in payment, the contract, although called a "lease," is manifestly a sale.³

Transactions of this nature are not confined to the rolling stock of railroads, but include pianos and organs, sewing machines as well as furniture. They are usually in the form of a lease, reserving as rent an amount which upon the expiration of the time during which the payments run, fully covers the value of the articles sold, in addition to interest and risk. The stipulation in the contract reserves the title in the vendor and is intended to avoid the publicity of a

¹*Forrest v. Nelson*, 108 Pa. 481; *Chamberlain v. Smith*, 44 Pa. 481; *Henry v. Patterson*, 57 Pa. 846; *Rowe v. Sharp*, 51 Pa. 26; *Enlow v. Klein*, 79 Pa. 488; *Crist v. Kleber*, 79 Pa. 290; *Becker v. Smith*, 59 Pa. 469.

²*McCall v. Powell*, 64 Ala. 254.

³*Summerson v. Hicks*, 134 Pa. 566.

recorded chattel mortgage; and although this is apparent upon the face of the transaction, courts have sometimes held that, if the buyer saw fit to sign the lease, he must be regarded as bailee and not as a purchaser.¹

But generally courts will not so construe the transaction, but regard it, not as a lease or renting, but as a conditional sale with title reserved in the vendor until the purchase price is paid.²

In determining the real character of a contract, the courts will always look to its purpose rather than to the name given it by the parties. The transaction is not changed by assuming the form of a lease.³

In *Murch v. Wright*, 46 Ill. 487, a contract of this character being under review, it was said that it was a mere subterfuge to call the transaction a lease.

It is evident in these transactions that the parties do not contemplate the full payment of the value, in a short period of time, for the mere use of the article said to be leased; and in all instances the sale of the article is admitted to be completed on the payment of the last installment. Such contracts are treated almost uniformly by the courts as conditional sales. It has been so held where parties expressly contracted "that no agreement of sale of said piano forte is implied."⁴

Various acts have been passed by the legislatures of many of the states, declaring that the bailment, lease or conditional sale,

¹*Bean v. Edge*, 84 N. Y. 510; *Haviland v. Johnson*, 7 Daly, 297; *Austin v. Dye*, 46 N. Y. 500; *Sargent v. Gile*, 8 N. H. 325; *Bailey v. Colby*, 84 N. H. 29.

²*Guilford v. McKinley*, 61 Ga. 232.

³*Hervey v. Rhode Island Locomotive Works*, 93 U. S. 673, 23 L. ed. 1003.

⁴*Gerow v. Castello*, 11 Colo. 560; *Fosdick v. Southwestern Car Co.* 99 U. S. 256, 25 L. ed. 844; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 839; *Huidkoper v. Hinckley Locomotive Works*, 99 U. S. 258, 25 L. ed. 844; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Hays v. Jordan*, 9 L. R. A. 373, 85 Ga. 741; *Singer Mfg. Co. v. Cole*, 4 Lea, 489; *Knüttel v. Cushing*, 57 Tex. 354; *Loomis v. Bragg*, 50 Conn. 228; *Singer Mfg. Co. v. Graham*, 8 Or. 17; *Lucas v. Campbell*, 88 Ill. 447; *Greer v. Church*, 18 Bush, 480; *Gerrish v. Clark*, 6 New Eng. Rep. 414, 64 N. H. 492; *Gorham v. Holden*, 4 New Eng. Rep. 502, 79 Me. 317; *Currier v. Knapp*, 117 Mass. 324; *Carpenter v. Scott*, 13 R. I. 477; *Sage v. Sleuts*, 28 Ohio St. 1; *Singer Sewing Mach. Co. v. Holcomb*, 40 Iowa, 33; *De Saint Germain v. Wind*, 3 Wash. Terr. 189; *Whitcomb v. Woodworth*, 54 Vt. 544; *Hintermister v. Lane*, 27 Hun, 497; *Price v. McCallister*, 3 Grant, Cas. 248; *Cole v. Berry*, 42 N. J. L. 308; *Sumner v. Cotley*, 71 Mo. 121; *Domestic Sewing Mach. Co. v. Anderson*, 23 Minn. 57.

or sale by the manufacturer or builder of rolling stock of railroad companies, with a reservation of title, possession being given, shall only be valid when the contract is in writing, signed, acknowledged and filed for record in the recorder's office in each county through which the railroad runs and upon which the rolling stock is to be used. Such enactments are in force in Illinois, Colorado (Gen. Stat. 1883, § 169), Dakota, Washington, New Mexico, Minnesota, Wisconsin, Ohio, Delaware, New Jersey, Maryland, North Carolina, West Virginia, Alabama, Kentucky, Tennessee, New York (Act of 1884, chap. 315, §§ 1, 2), Iowa (Revised Code 1880, §§ 19, 20), South Carolina (Gen. Stat. 1882, §§ 20-22. Also Acts of 1882, chap. 20), Missouri (Rev. Stat. 1879, § 2505).

In some states, as in Illinois, such a contract is declared to be binding only for four years and not renewable. In other states a longer period of time is given. By some statutes, the rolling stock is required to have prominently placed thereon an ownership plate or mark.

Enactments somewhat dissimilar exist in most of the other states, sometimes declaring such contract void if not recorded, as against purchaser or creditors without notice, and others denying their validity even where there has been actual notice.¹

There are also various provisions among the different states applying in terms to chattel mortgages, limiting the time of their renewal.

It is evident, from this class of legislation, that whether the contract between the "car trust" company and the railroad company be a bailment for hire containing no option of purchase; or conditioned that when the hire contracted to be paid is received, the rolling stock becomes the property of the railroad company; or, if it be in the form of a lease with or without the condition that the property pass when the rental is paid; or even, if the form of a conditional sale is used—which probably truly expresses the intention of the parties—it will be necessary, in order to protect the car trust association in its right of property as against third parties, that the instrument affecting the transfer of the rolling stock shall be recorded, in conformity to the statutory

¹*Henderson v. Morgan*, 26 Ill. 431; *Porter v. Dement*, 35 Ill. 479.

requirements, as though the contract assumed the form of a sale, in terms securing the purchase money by a chattel mortgage.

In some of the states the formalities authorizing the recording of such an instrument are peculiar. In New Hampshire the vendor and purchaser, upon a conditional sale of chattels, are required to make and subscribe an affidavit that the memorandum is made for the purpose of witnessing the lien and the sum due thereon, as specified in the instrument, and for no other purpose whatsoever; and that such lien and the sum due thereon were not created for the purpose of enabling the purchaser to execute the instrument, but that the lien is a just lien, and the sum said to be due thereon is honestly due and owing from the purchaser to the vendor. And under this statute a lien retained for the price, upon the conditional sale of chattels, is held good against an assignee in insolvency of the conditional vendee, although the affidavit is not made entitling the instrument to record.¹

In the case of a conditional sale, where the statutory requirements as to notice are strictly complied with, as no title has passed from the purchaser, there can be no lien acquired by subsequent incumbrances upon the property, nor can a title be acquired by the purchaser, except by complying with the condition of a sale, unless the vendor waive such precedent condition, and whether such waiver has occurred or not is generally a question of fact for the jury.² Of course if the condition as to payment before the title passes be waived, the title passes to the vendee, and is subject to all liens against his property.³

Where under a purchase it is agreed that, although the property is delivered, the title shall remain in the vendor until the price is paid, it is a conditional sale, no matter what form the transaction may assume.⁴

¹*Adams v. Lee*, 6 New Eng. Rep. 418, 64 N. H. 421.

²*Furlow v. Ellis*, 15 Gray, 229.

³*Whitney v. Eaton*, 15 Gray, 225; *Seed v. Lord*, 66 Me. 580; *Stone v. Perry*, 60 Me. 48.

⁴*Watertown S. E. Co. v. Davis*, 5 Houst. (Del.) 192; *Bryant v. Crosby*, 36 Me. 562; *Hervey v. Rhode Island Locomotive Works*, 98 U. S. 664, 23 L. ed. 1008; *Hays v. Jordan*, 9 L. R. A. 373, 85 Ga. 741; *Hintermister v. Lane*, 27 Hun, 497; *Gerow v. Castello*, 11 Colo. 580; *Currier v. Knapp*, 117 Mass. 324; *Rowan v. Union Arms Co.* 36 Vt. 124; *Bryant v. Crosby*, 36 Me. 562; *Conway v. Alexander*, 11 U. S. 7 Cranch, 218, 8 L. ed. 321; *Glover v. Payn*, 19 Wend. 518; *Logwood v. Hussey*, 60 Ala. 417; *Thompson v. Chumney*, 8 Tex. 389.

It is only by express statute, that under a conditional sale, where no record of the transaction has been made, parties ignorant of the title may assert their liens as against the vendor.¹

In such cases the vendor is estopped from asserting his title, on the ground that it would operate as a fraud upon the innocent purchaser, the vendor having neglected to preserve the insignia of title as required by statute.²

An attempt has been made to include in the property which may be protected by a reservation of title on its sale, the rails and other property which becomes affixed to and a part of a railroad, covered by a prior mortgage; as well as bridges and bridge materials. But the courts have held that whatever may be the rule applicable to locomotives and cars and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being affected by a prior mortgage given by a railroad company covering after acquired property, it is well settled, in the decisions, that rails and other articles which become affixed to and a part of the railroad covered by a prior mortgage will be held by the lien of such mortgage, in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company.³

A mortgage of a railroad and all its property, real and personal, includes and covers old iron rails, etc., taken up from the road as useless and replaced by new, and also new rails purchased to be laid on the road, but which have not been actually laid.⁴

¹*Harkness v. Russell*, 118 U. S. 667, 30 L. ed. 286; *Marvin Safe Co. v. Norton*, 28 Rep. N. J. 248; *Everett v. Hall*, 67 Me. 497; *King v. Bates*, 57 N. H. 446; *Benner v. Puffer*, 114 Mass. 376; *Lanman v. McGregor*, 94 Ind. 801.

²*Murch v. Wright*, 46 Ill. 487; *Guilford v. McKinley*, 61 Ga. 282; *Greer v. Church*, 18 Bush, 430; *Robbins v. Phillips*, 68 Mo. 100; *Hervey v. Rhode Island Locomotive Works*, 98 U. S. 672, 23 L. ed. 1008; *Domestic Sewing Mach. Co. v. Anderson*, 23 Minn. 57; *Gerriah v. Clark*, 6 New Eng. Rep. 414, 64 N. H. 492.

³*Thompson v. White Water Valley R. Co.* 132 U. S. 68, 33 L. ed. 256; *Porter v. Bessemer Steel Co.* 123 U. S. 267, 30 L. ed. 1210; *Dunham v. Cincinnati, P. & O. R. Co.* 68 U. S. 1 Wall. 254, 17 L. ed. 584; *Galveston H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459, 480, 482, 20 L. ed. 199-206; *United States v. New Orleans R. Co.* 79 U. S. 12 Wall. 362-365, 20 L. ed. 484-486; *Dillon v. Barnard*, 88 U. S. 21 Wall. 430-440, 23 L. ed. 673-678; *Fosdick v. Schall*, 99 U. S. 235-251, 25 L. ed. 339-342.

⁴*First Nat. Bank of Salem v. Anderson*, 75 Va. 250; *Weetjen v. St. Paul P. R. Co.* 4 Hun. 429; *Palmer v. Forbes*, 28 Ill. 301; *Farmers Loan & T. Co. v. Commercial Bank*, 11 Wis. 207, 15 Wis. 424; *Farmers Loan & T. Co. v. Cary*, 13 Wis. 110; *Dinsmore v. Racine & M. R. Co.* 12 Wis. 649; *Brainard v. Peck*, 34 Vt. 496.

But rails laid down to form a temporary track to obtain gravel from a pit, or to take stones from a quarry, or to take freight from a certain point, become no part of the railway, and do not pass under a general mortgage of the railroad.¹ Nor do tools and other implements which have been merely used in repairing the railway or the machinery used upon it, but are not in any way attached to the realty, pass under such a mortgage. And the same is true as to coal, wood and other materials used for fuel. Nor will office furniture nor an iron safe be subject to such a mortgage.²

Such a mortgage only follows and attaches to any property which is an accession to the thing granted, which is embraced within the power of a company as it existed when the mortgage was executed.³ Indeed under the term "appurtenances" as used in a mortgage made by a railroad company upon its road, only such property passes as is indispensable to the use and enjoyment of the franchise of the company. Although a railroad company possess a separable legal interest in an elevator, it is not appurtenant to its railroad, within the meaning of a mortgage upon the railroad and its appurtenances, where the building is situated more than half a mile from the railway and is erected on land not belonging to the company.⁴

The rolling stock purchased by a railroad company does not come under a prior mortgage, where the title is reserved to the vendor, so long as the purchase price remains unpaid. Where rolling stock consisting of two locomotives and ten cars had been sold to the New Orleans & Ohio R. Co. by the United States in 1866, and simultaneously the company gave to the United States a bond for the purchase money, wherein it was stipulated that the latter should have a lien therefor upon the property sold, and that the company should not sell it or part with it until the payment of the price, without the consent of the United States, it was held that a prior mortgage by the railroad company cover-

¹*Van Keuren v. New Jersey Cent. R. Co.* 38 N. J. L. 165.

²*Hunt v. Bullock*, 23 Ill. 320. But, on this question examine *Coe v. McBrown*, 23 Ind. 252; *Titus v. Mabes*, 25 Ill. 257.

³*Seymour v. Canandaigua & N. F. R. Co.* 25 Barb. 284; *Shaw v. Bill*, 95 U. S. 10, 24 L. ed. 333; *Elwell v. Grand St. & N. R. Co.* 67 Barb. 83; *Meyer v. Johnston*, 53 Ala. 237.

⁴*Humphreys v. McKissock*, 140 U. S. 304, 35 L. ed. 473.

ing all future acquired property attached only to such interests therein as the company acquires subject to any liens under which it came into the company's possession; and, that if the company purchases property subject to a lien for the purchase money, such lien is not displaced by the general mortgage. That if the company gives the mortgage for the purchase money at the time of the purchase, such mortgage, whether registered or not, is precedent of the general mortgage. A mortgage of after acquired property only attaches to the property in the condition in which it came into the hands of the mortgagor. If it comes into his hands incumbered already with a lien, the mortgage attaches subject to that lien.¹

The ordinary experience of railroad building is the acquirement of the franchise, the organization of the corporation and the placing of the first mortgage upon the property with the usual "after acquired property" clause in it. The construction of the railroad proceeds; it is finished; rolling stock is necessary, and the corporation acquires it under a conditional sale contract of purchase. The enterprise is a failure; the mortgage interest is unpaid; the trustee discharging its duty, is bound to know that the rolling stock is held subject to the liens attending its purchase. It asks the court to take possession, not alone of the railroad, but also of the rolling stock thus acquired and held. The application is not resisted. The court is ignorant of the history of the enterprise; it sustains the application and appoints a receiver, and the road is taken possession of by that receiver. It cannot be held that such possession, taken at the instance of the trustee, casts no burden on the road, either for the purchase price or rental, prior to the claim of the original mortgage. The trustee cannot forcibly, through the power of the court, compel an appropriation of this rolling stock for the benefit of its property subject to its lien, without compensation. Its application for possession carries with it an assent that at least rental for such rolling stock shall be paid as one of the expenses of the receivership, which it has invoked.²

¹*New Orleans & O. R. Co. v. Mellon*, 79 U. S. 362, 20 L. ed. 434; *Beall v. White*, 94 U. S. 383, 24 L. ed. 178; *Pennock v. Coe*, 64 U. S. 23 How. 117, 16 L. ed. 436; *Loomis v. Davenport & St. P. R. Co.* 17 Fed. Rep. 801; *Florida v. Anderson*, 91 U. S. 667, 18 L. ed. 290; *Wright v. Kentucky & G. E. R. Co.* 117 U. S. 72, 29 L. ed. 821.

²*Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379.

When the courts will thus equitably protect the rights of a vendor under his contract of conditional sale, it would seem reasonable that all pretenses of "leasing" should be avoided, and the vendor stand squarely on his real contract.

In England a lien upon the personal as well as real property need not be registered as a bill of sale.¹

But although creditors not having actual notice of an unrecorded lien, may levy upon the property in the possession of the corporation, notwithstanding the lien creditors have instituted foreclosure proceedings,² yet, as between the parties thereto, such unrecorded mortgage is effective and has priority over the claims of other persons who became creditors of the corporation with actual knowledge of the lien, unless the statutes expressly provide otherwise.³

So a mortgage of a railway and its after acquired property will not extend to property obtained by it through fraud; so that the title thereto does not vest in it. Nor will it extend to property acquired by it illegally and without authority.⁴

It may therefore be said that a car trust with debentures issued by the vendor, secured by the assignment to the trustee of the notes, and of a properly recorded contract of conditional sale, which does not pass the title to the vendee until full payment is made, is a safe investment, if the equipment furnished is at all in proportion to the reasonable needs of the railway company. Or such trust will be ordinarily sufficient, if resting directly upon the notes and contract of conditional sale, without the debentures of the equipment company; as the purchaser of the notes, secured by the deposit in trust of the conditional contract, is assured that no subsequent incumbrances can attach to the equipment, and

¹*Read v. Joannon*, L. R. 25 Q. B. Div. 300; *Edmonds v. Blaina Furnaces Co.* L. R. 86 Ch. Div. 215. *Sopham v. Greuside*, L. R. 87 Ch. Div. 281; *Brocklehurst v. Manchester S. T. Co.* 34 Week. Rep. 568.

²*Coe v. New Jersey Midland R. Co.* 31 N. J. Eq. 105.

³*Coe v. Columbus, P. & I. R. Co.* 10 Ohio St. 372, 75 Am. Dec. 518

⁴*Branch v. Atlantic & G. R. Co.* 9 Woods, 481; *Randolph v. New Jersey W. L. R. Co.* 28 N. J. Eq. 49; *Coe v. New Jersey Midland R. Co.* 31 N. J. Eq. 105; *Meyer v. Johnston*, 58 Ala. 237; *Williamson v. New Jersey S. R. Co.* 28 N. J. Eq. 277, 29 N. J. Eq. 311; *Field v. Post*, 38 N. J. L. 346 *Frazier v. Fredericks*, 24 N. J. L. 162.

that a mortgage of after acquired property only attaches to such interests as the mortgagor acquires.¹

As the courts have, disregarding forms, held contracts of lease of equipments to be "a mere subterfuge,"² there seems no reason to cloud a legitimate transaction of conditional sale with suspicion, by adopting the discredited disguise of a lease. Especially is this true when we notice that some of the courts have held the parties to the form adopted by them, when the interests of justice require such a ruling.³

In this view the danger of such a contract becomes apparent, when it is considered that the possession under the so-called lease, with a contract of conditional sale, may be held as only taken under the lease, and if the property is destroyed before the time of transferring the title under the terms of the conditional sale, the latter contract may be held annulled, by reason of the failure of consideration, through the loss of the property, and the resulting inability of the vendor to deliver the property. Under such circumstances a court of equity will refuse to enforce the contract of sale, holding no sufficient possession has been taken under that contract, but only under the lease.

In a recent case it was ruled that one in possession of property under a contract to lease it at a fixed monthly rental for five years, and contracting that at the end of that time he would purchase it at a stipulated price, will not, before the expiration of the five years, be held to have entered under his contract to purchase for the purpose of enforcing specific performance against him, and in case the property is destroyed by fire within that time, his obligation to purchase is at an end.

The court held that for the purpose of determining the liability of the party in possession under his agreement of lease and subsequently to purchase, in case of the destruction of a material part of the property prior to the time for payment and conveyance, this distinction between the lease and agreement of purchase ought to be made. That a party entering under such a contract should

¹ *Williamson v. New Jersey S. R. Co.* 29 N. J. Eq. 277, 29 N. J. Eq. 311; *Haven v. Emery*, 33 N. H. 66.

² *Murch v. Wright*, 46 Ill. 487; *Guilford v. McKinley*, 61 Ga. 282, and authorities previously cited.

³ *Beam v. Edge*, 84 N. Y. 510, and authorities cited.

be deemed, when the object is the enforcing of a most inequitable liability, to have entered and to be holding under his contract of lease, as his possession could be referred to either the lease, or to the contract of purchase, as distinct from the lease. There can be no doubt that during the term of the lease he would hold under that.

His right to remain in possession would depend on his payment of what the parties to the contract themselves designate as rent, and the performance of other covenants of the lease, and would be determined by failure so to pay and perform.¹

But under a contract of conditional sale, when possession is taken under the terms of the contract itself and no further instrument is necessary to pass the title, which is complete by the terms of the contract on full payment being made, equity will undoubtedly enforce the completion of the purchase.²

b. Contracts among Corporations to Prevent Ruinous Competition.—A contract between two rival and competing railroad companies, the purpose or result of which is to prevent unhealthy competition, and which does not raise rates of transportation above the standard of fair compensation, or violate any duty that is owing to the public from noncompeting roads, is not void as against public policy.³

And it has been held that where a corporation, to avoid ruinous competition and litigation with a rival company, and to prosecute the business with more beneficial results to its stockholders under its own control, pursuant to an arrangement with the rival company, assigns its business and its patents to a new corporation organized for the same objects, and takes a majority of the stock therein, it cannot be declared as matter of law to have abandoned or suspended its ordinary and lawful business so as to afford ground for its dissolution under the statute.⁴

¹*Smith v. Phoenix Ins. Co.* (Cal.) 13 L. R. A. 475, on rehearing, setting aside an opinion to the contrary filed March 10, 1890.

²*Smith v. Phoenix Ins. Co.* (Cal.) 13 L. R. A. 475; *King v. Buckman*, 24 N. J. Eq. 559; *Doud v. Clarke*, 54 Cal. 48; *Hall v. Center*, 40 Cal. 63; *DeRutte v. Muldrow*, 16 Cal. 505; *Laffan v. Naglee*, 9 Cal. 663; *Hurford v. Purrier*, 1 Madd. 538; *Baker v. Holtsaffell*, 4 Taunt. 45; *Phillips v. Stevens*, 16 Mass. 238.

³*Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 9 L. R. A. 689, 3 Inters. Com. Rep. 819.

⁴*Kelsey v. Pfaunder P. F. Co.* 19 Abb. N. C. 434, 45 Hun. 15; *Leslie v. Lorillard*, 1 L. R. A. 453, 110 N. Y. 519; *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.* 37 Fed. Rep. 286; *Ives v. Smith*, 28 N. Y. S. R. 917.

A compromise agreement to prevent competition between two corporations in the manufacture of fish glue under a patent, whereby an article nearly worthless is to be converted into one of large value, is not against public policy.¹

Nor is a contract by one party to sell the bags and burlaps of another at a fixed commission, he to have the exclusive sale and to sell a specified quantity, the owner to accept the average price received by the former for all bags sold, standing alone, illegal.²

§ 59. **Corporate Combinations to Prevent Fair Competition; "Trade Trusts."**—In an effort to avoid the condemnation of the law shelter has been sought under what has ever been held most sacred in equity,—a trust—a thing over which equity, to prevent fraud, has asserted and exercised an exclusive jurisdiction. The same combinations to prevent competition, condemned already by the law, are attempted to be worked out at the footstool of the chancellor, concealed in the form there most favored. It is like the outlaw grasping the horns of the altar for security, but unlike him, it conceals its guilt and demands protection, protesting its innocence, while pursuing its iniquity. The act is the culmination of corporate insolence and deceit.

The history of these so-called Trusts has been written by William H. Winters in the "Bibliography of Commercial Trusts."

¹*Gloucester I. & G. Co. v. Russia C. Co.* (Mass.) 12 L. R. A. 563.

²*Pacific Factor Co. v. Adler*, 90 Cal. 110.

³ *Railway & Corp. L. J.* 236, citing among others, *People v. American Sugar Ref. Co.* (Cal.) 7 Ry. & Corp. L. J. (1890). 83; Comm. 90 Cent. L. J. (1890) 114; Appointment of Receiver, Decision by Wallace, J., Feb. 17, 1890, Daily Alta Californian, Feb. 18, 1890; *People v. North River Sugar Ref. Co.* 5 L. R. A. 887, 54 Hun. 354, brief of Pryor, counsel, Pamphlet, New York, 1888; Brief of Atty-Gen.; Brief of Parsons; Brief of Daly; Brief of Carter; Opinion of Barrett, J., and briefs, 2 L. R. A. 83, 22 Abb. N. C. 164; 16 N. Y. Civ. Proc. 1; 22 Am. & Eng. Corp. Cas. 511; Briefs on appeal of *People v. North River Sugar Ref. Co.* and opinion, Daniels, J., 5 L. R. A. 386; 2 N. Y. L. J. 1505; 36 N. Y. Daily Reg. 726; Decision by Court of Appeals, 23 Abb. N. C. 314; 2 N. Y. L. J. 2155; Commonwealth Ref. Co. Incorporation, Conn. Special Acts 1889, p. 1096; Standard Oil Co. Camden, 136 N. Am. Rev. p. 181; Dodd (S. C. T.) Pamphlet, New York, 1888; Hudson, Railway and the Republic, 1886; Lloyd, 47 Atl. Mo. 1881, 317; Welch, 186 N. Am. Rev. 1883, 191; Trust Agreement N. Y. World, Feb. 28, 1888; N. Y. Senate Doc. 50 (1888) 455; Brief History of Trusts, its Methods and Influence, N. Y. 1887; Railway Discrimination in Favor of Trusts, 1 Inters. Com. Rep. (1888) 503; S. C. 1 Inters. Com. Rep. (1888) 722; Report No. 3112, U. S. House Rep. 50th Congress, July 20, 1888; Report of Com. on Manufactures in Relation to Trusts, Washington, D. C. Part 1, Sugar Trust; Part 2, Standard Oil

Many of the states have passed laws to prohibit combinations among railroad corporations to suppress competition between them, and in some of the states the duty to pass such legislation, is enjoined by constitutional provisions.

Constitutional and statutory provisions affecting combinations between railroads to prevent competition.

ALABAMA—Code 1886, vol. 1, § 1536, p. 389.

ARIZONA—Rev. Stat. 1887, § 318, p. 113.

ARKANSAS—Const. 1874, art. 17, § 4; Act March 24, 1887, § 2; Laws, p. 114.

COLORADO—Const. 1876, art. 15, § 5; Rev. Stat. 1883, § 353, p. 211; Rev. Stat. 1883, § 360, p. 213. The meaning of the last clause of article 15, section 4, of the Constitution of Colorado, which provides that "every railroad company shall have the right with its road . . . to connect with . . . any other railroad," is that such roads are to be connected physically, as distinguished from the business connection between roads which have approximate termini.¹

Where two railway companies agree that they shall accept no freight for certain places, except to be carried over the road of the other, it is a conspiracy to grasp commerce and suppress the building of railroads in two great states. A contract of this kind is against public policy, and therefore void.²

A contract by which one railroad company agrees with another upon a division of territory and traffic between them, and that one will not "do any through business to and from New Mexico, *via* Trinidad or El Moro," amounts to an express renunciation of a duty of transportation enjoined by the State, and is therefore void.³

Trust; *State v. American Cotton Oil Trust*, 40 La. Ann. 8; *Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632; *People v. Chicago Gas Trust Co.* 8 L. R. A. 497, 180 Ill. 268; *Gould v. Head*, 28 Fed. Rep. 886, 41 Fed. Rep. 240; *State v. Nebraska Distilling Co.* 29 Neb. 700; *Moqui Steamship Co. limited, v. McGregor*, Eng. Ct. of App. (1889,) 225; *Minturn's History of Trusts*, 8 Bedford's Mag. 61; *Railway Trusts*, 5 Ry. & Corp. L. J. 165; 6 Ry. & Corp. L. J. 61, 101, 201; *The Monopoly Trust*, 8 Ry. & Corp. L. J. 315; *Butchers, Envelope, Milk, Oil and Rubber Trusts*, New York Times, Feb. 24-29, 1888; Report Canadian House Commons, 6 Parl. 2d Session; Report Select Committee, N. Y. Senate, *Cornering Grain*, vol. 5, Senate Doc. 1888, No. 45.

¹*Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 13 Fed. Rep. 546.

²*Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 15 Fed. Rep. 650, 4 McCrary, 325, reversed on another point in 110 U. S. 667, 28 L. ed. 291.

³*Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 15 Fed. Rep. 650.

CONNECTICUT—Act April 17, 1883, § 1; Laws, p. 267.¹

DAKOTA—Civil Code 1883, § 473, 1, p. 830.

FLORIDA—Act June 7, 1887, § 1; Laws, p. 117.

GEORGIA—Const. 1877, art. 4, § 2, par. 4; Act Sept. 27, 1881, § 15; Laws, p. 165. Where a railroad corporation is about to purchase a controlling interest in the stock of a rival railroad, the sale would be invalid, and should be restrained.²

ILLINOIS—Const. 1870, art. 11, § 11. Under the Act of February 12, 1885, all railroad companies have power to make contracts and arrangements with each other for leasing or running their respective roads, or any part thereof; and a plea to an information in the nature of a *quo warranto*, charging one company with usurping the powers and franchises granted to another, which sets up a contract between it and the other company, authorizing it to operate the road of such other company, and that it is operating the road under such contract, is a good plea.³

INDIANA—Rev. Stat. 1888, § 3951. There being no statute in Indiana which in terms forbids or prohibits railroad corporations of that State from executing leases of their property, a lease made by such a corporation, and which is neither in violation of any statute nor against the public policy of the State, is valid.⁴

Where several insurance companies equalize rates of insurance in a large city, and agree not to insure themselves under penalty, the agreement is void.⁵

IOWA—Rev. Code 1884, § 1297, p. 341. The power to declare contracts void as against public policy should only be exercised in cases that are free from doubt.⁶

KANSAS—Comp. Laws 1885, § 5221, p. 778; § 5222, p. 779.

MAINE—Rev. Stat. 1883, chap. 51, § 54, p. 480.

¹See *State v. Hartford & N. H. R. Co.* 29 Conn. 539.

²*Central R. Co. v. Collins*, 40 Ga. 582; *Havemeyer v. Havemeyer*, 11 Jones & S. 506, 515. Acts consolidating the Central Railroad & Banking Company with the Macon & Western Railroad Company construed. *Central R. & Bkg. Co. v. State*, 54 Ga. 401; followed in *Savannah, G. & N. A. R. Co. v. State*, 55 Ga. 557.

³*Illinois Midland R. Co. v. People*, 84 Ill. 426.

⁴*Pittsburgh, O. & St. L. R. Co. v. Columbus, O. & I. C. R. Co.* 8 Biss. 456.

⁵*Metsger v. Cleveland*, Marion Sup. Ct. (Ind.) 3 Ind. Law Mag. 42 (1883).

⁶*Richmond v. Dubuque & S. C. R. Co.* 26 Iowa, 191.

MARYLAND—Rev. Code 1878, p. 359.

MICHIGAN—Const. 1850, art. 19 A, § 2; How. Ann. Stat. 1882, § 3343, p. 854.

MINNESOTA—Gen. Stat. 1878, p. 381; Act March 3, 1881, § 3; Laws, p. 110. By virtue of Special Laws 1870, chap. 57, § 4, and Special Laws 1871, chap. 71, § 1, the Minneapolis Railroad Company has authority to make a valid lease to another company of this State of rights which it has acquired since the passage of said chapter 71, by condemnation of land.¹

MISSOURI—Const. 1875, art. 12, §§ 17, 18; Act March 30, 1887, § 1; Laws, p. 102; Id. § 2.²

NEBRASKA—Const. 1875, art. 11, § 3; Laws 1887, chap. 60, § 5, p. 543.

NEW HAMPSHIRE—Gen. Laws 1878, p. 377. In *Currier v. Concord Railroad Corporation*, 48 N. H. 321, 325, the court says: "The object of the law is to prevent the consolidation of rival and competing lines of railroad by contracts or arrangements between them, by means of which competition is removed; the purpose being to prevent the increase of the charges of such railroads beyond what might be expected under the influence of a free competition."³

NEW JERSEY—Act 1880; Pub. Laws 1880, 231, authorizing railroads to lease roads, etc., simply confers a right to exercise the power given after consent of those affected thereby, or payment of satisfactory compensation. The Act providing for the consolidation of railroads does not give by implication the power to lease.⁴

Whether a provision in the charter of a railroad company authorizing it to lease or consolidate with any other railroad, and authorizing any company to take such lease and operate the same, would be sufficient to confer such authority upon any railroad of the State, does not arise in a pending case, where the title of the Act incorporating the railroad company does not indicate such subject, and such provision of its charter is therefore void.⁵

¹*Pence v. St. Paul, M. & M. R. Co.* 28 Minn. 488.

²*See Wiggins Ferry Co. v. Chicago & A. R. Co.* 78 Mo. 389; 5 Mo. App. 347.

³Greenhood, Public Policy, 663-673.

⁴*Mills v. New Jersey Cent. R. Co.* 2 Cent. Rep. 239, 41 N. J. Eq. 1.

⁵*See Camden & A. R. Co. v. Mays Landing & E. H. C. R. Co.* 4 Cent. Rep. 801, 48 N. J. L. 530.

NEW YORK—Rev. Stat. 1882, p. 1592. Under the Statutes of New York railway lines cannot be consolidated unless they are substantially continuous lines, or running in the same general direction.¹

The proprietors of five lines of boats, engaged in the transportation of persons and freight, combine, and stipulate that they all shall charge certain prices, the net earnings of all to be divided according to certain fixed proportions. The agreement is invalid.²

The proprietors of all boats on the Erie and Oswego canals entered into an agreement to establish a uniform scale of prices of freight and passage, and to divide the profits arising therefrom proportionately, according to the number of boats employed, with a provision preventing the members from engaging in similar business outside of the combination. The contract was illegal.³

A contract by the owners of a railroad to be made, under an Act of incorporation, with the owners of a rival railroad, not to continue such road beyond a certain point, is void as contravening public policy.⁴

The acquisition of lands to prevent interference of competing lines, or for purposes of speculation, cannot be consummated under the statutes authorizing the taking of private property for public use.⁵

Public policy is opposed to any infringement of the rights of travel, or of any of the facilities which competition may furnish, and the law will not uphold any agreement which does or may injuriously affect such rights or facilities.⁶

A contract made by a corporation in violation of the terms of its charter is *ultra vires*, and void as against public policy.⁷

¹2 Rev. Stat. (7th ed.) 1590; *People v. Boston, H. T. & W. R. Co.* 12 Abb. N. C. 280.

²*Hooker v. Vankerwater*, 4 Denio, 340.

³*Stanton v. Allen*, 5 Denio, 431, 435; *Transportation Cases*, Whart. Prec. No. 658.

⁴*Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411.

⁵*Rensselaer & S. R. Co. v. Davis*, 48 N. Y. 187.

⁶*Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411. See *People v. Boston & A. R. Co.* 70 N. Y. 569, 570; *Chicago etc. R. Co. v. Atty-Gen.* 9 West. Jur. 347 (1875).

⁷*Union Bridge Co. v. Troy & L. R. Co.* 7 Lans. 240.

A railway company cannot transfer or lease its line unless authorized by statute.¹

By chapter 444 of 1859, the Long Island Railroad Company was authorized to take a lease of any railroad that might be connected therewith. Held, that under this provision of the statute, a lease might be taken of a competing road, provided that, when united, the two roads were capable of forming a continuous line.²

The manner of procedure against a consolidated corporation was determined in *Prouty v. Lake Shore & M. S. R. Co.* 6 Hun, 246, 64 N. Y. 641.

An agreement by a steamship corporation to buy out a competing line which, in consideration of a monthly payment, agrees to discontinue running vessels between ports mentioned, and not to charter or sell its vessels for use on that route, and not to become in any way interested in the running of steamships between those places, is not void as in restraint of trade.³

An agreement between plaintiff and defendant, each being a railroad company, that plaintiff would at all times deliver to defendant for transportation all the freight and passengers that it could lawfully control or influence, and that it would use its influence to promote the interests and business of defendant company as far as it could properly; that defendant would use its influence and exercise its control to promote plaintiff's interest; that it would make good any deficiencies of plaintiff to meet the interest upon its present bonded indebtedness; that plaintiff should cause to be deposited with defendant a majority of its capital stock; and that, so long as the management of the plaintiff company should be satisfactory to defendant, the latter would give to the representative of plaintiff the right to vote upon the stock so deposited,—is not *per se* void on the ground that it is contrary to public policy.⁴

¹ *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.* 86 N. Y. 107; *Hinckley v. Gildersleeve*; 19 Grant, Ch. (U. C.) 212. See also *Atty-Gen. v. Niagara Falls Int. Bridge Co.* 20 Grant, Ch. (U. C.) 34; *Pittsburgh & C. R. Co. v. Bedford & B. R. Co.* 81 *Pa. 104; *Woodruff v. Erie R. Co.* 25 Hun, 246; *Abbott v. Johnstown, G. & K. Horse R. Co.* 80 N. Y. 27; *Archer v. Terre Haute & I. R. Co.* 102 Ill. 498.

² *Wallace v. Long Island R. Co.* 12 Hun, 460.

³ *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519.

⁴ *Tonawanda Valley & C. R. Co. v. New York, L. E. & W. R. Co.* 42 Hun, 496.

NORTH CAROLINA—The North Carolina Railroad company is invested by its charter with full authority to lease its road, with power to the lessee to change the gauge thereof.¹

OHIO—Rev. Stat. 1884, p. 674, § 3300; Act April 22, 1885, Laws, p. 150. The lines of two railway companies, which are in their general features parallel and competing, cannot be connected for the carriage of freight and passengers over both "continuously," within the meaning of Revised Statutes, § 3379; and hence such companies cannot become consolidated into one corporation under that section.²

PENNSYLVANIA—Const. 1874, art. 17, § 4. The Lateral Railroad Act is constitutional.³

The Act of March 29, 1840, is a supplement to the Act of May 5, 1832, is *in pari materia* with it, and should be so construed; and neither Act authorizes the connection of a lateral road, except with a public improvement.

Two railway companies owning lines of railroad connected only by other railroads which such companies hold by lease, are not authorized to become consolidated into one corporation under Pennsylvania Revised Statutes, § 3379.⁴

The lease of a railway is held invalid in *Kersey Oil Co. v. Oil Creek & A. R. Co.* 12 Phila. 374.

Where a corporation authorized to make purchases and sales of and investments in the bonds and securities of other corporations, contracted for the purchase of a controlling interest in the stock and securities of a projected line of railroad, the consideration coming from another railroad company, and the projected railroad having a traffic contract with such other railroad company, by which the former, when completed, would be a parallel or competing line with it, the corporation in whose name the contract of purchase was made not owning a parallel or competing line, the transfer of the property, or any of it, will be enjoined as coming within Pennsylvania Constitution, art. 17, § 4, which prohibits

¹*State v. Richmond & D. R. Co.* 72 N. C. 634, 73 N. C. 527.

²*State v. Vanderbilt*, 87 Ohio St. 590.

³*Harvey v. Lloyd*, 3 Pa. 331; *Schoenberger v. Mulhollan*, 8 Pa. 134; *Hays v. Risler*, 82 Pa. 169.

⁴*Keeling v. Griffin*, 56 Pa. 305.

any railroad from acquiring or consolidating with a parallel or competing railroad.¹

SOUTH CAROLINA—Gen. Stat. 1882, § 1425, p. 416.

TENNESSEE—Act March 28, 1887; Laws, p. 329. A preliminary injunction was granted to restrain the withdrawal of railway connection with an old established stock yard, the withdrawal being attempted to aid in the erection of a monopoly at another point.²

TEXAS—Const. 1876, art. 10, §§ 5, 6; Civil Stat. 1888, vol. 2, p. 442, art. 42, 46. An agreement between several railroad companies, some of which own and control competing lines, for the appointment of a common governing committee, or an association (composed of one member from each company) to fix the rates for which freights should be carried to and from points within the State of Texas, is illegal because contrary to article 10, § 5, of the Constitution of Texas, which provides that "no railroad . . . or managers of any railroad corporation shall consolidate the stock, property or franchises of such corporation with . . . or in any way control any railroad corporation owning or having under its control a parallel or competing line."

The language of this provision of the Constitution of Texas evinces that control in any manner and to any extent was intended to be prohibited—provided it was such as is calculated to enable one railroad, by means of a contract or agreement for interference in the other's affairs, to keep down competition between them. Even in the absence of such constitutional provision,—*quære*, whether action under the agreement could not be enjoined as being in restraint of competition and contrary to public policy.³

WEST VIRGINIA—Const. 1872, art. 11, § 11; Code 1887, p. 521.

WISCONSIN—Rev. Stat. 1878, § 1833, p. 536. Such combinations are illegal at common law, because contrary to public policy. Agreements for such combinations and promises founded thereon

¹*Pennsylvania R. Co. v. Com.* (Pa.) 4 Cent. Rep. 495, 501.

²*Coe v. Louisville & N. R. Co.* 3 Fed. Rep. 775.

³*Gulf, C. & S. F. R. Co. v. State*, 1 L. R. A. 849, 2 Inters. Com. Rep. 335, 72 Tex. 404.

will not be enforced,¹ and the carrying out of the combinations will be enjoined.²

Unless specially authorized by statute to lease its road, a railroad cannot, by so doing, defeat its obligations to the public, or escape the liability which the law imposes for torts, although committed by its lessee.³

Where several common carriers combine as an association, the object of which is to reduce competition between them, and to provide a uniform charge for carriage, and fix upon such a rate, each member to pay a fine for carrying freight for less than the same, the agreement is void, and the association cannot recover the fine.⁴

A railroad company without statutory authority cannot guarantee the covenants of another company in the lease of a railroad, merely because of an anticipated increase of its own business in consequence of such lease.⁵

The charter of a railroad company is—outside the limits of the rule against impairing the obligation of contracts—subject to the Constitution, statutes and public policy of the State by which the corporation was created. If the Constitution, statutes or public policy of the State forbid the company from entering into combinations to prevent competition, the act of the company in entering into such a combination is *ultra vires* even though the combinations involves interstate traffic; and the state courts have jurisdiction to enjoin the act or to forfeit the charter of the company therefor.⁶

¹*Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Sayre v. Louisville Union Benev. Asso.* 1 Duv. 143; *Morgan v. Donovan*, 58 Ala. 241; *Hartford & N. H. R. Co. v. N. Y. & N. H. R. Co.* 3 Robt. 411; *State v. Hartford & N. H. R. Co.* 29 Conn. 538.

²*Central R. Co. v. Collins*, 40 Ga. 532; *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 5.

³*Lakin v. Willamette Valley & O. R. Co.* 13 Or. 436; *Balsley v. St. Louis, A. & T. H. R. Co.* 6 West. Rep. 469, 119 Ill. 68.

⁴*Sayre v. Louisville Union Benev. Asso.* 1 Duv. 143.

⁵*Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 88).

⁶*Tippecanoe County v. Lafayette, M. & B. R. Co.* 50 Ind. 85 (competitive traffic between Lafayette, Ind. and points in Ill.); *State v. Vanderbilt*, 37 Ohio St. 590 (competitive traffic between Cincinnati, Ohio, and points outside Ohio reached through ports on Lake Erie); *Pennsylvania R. Co.'s App.* (Pa.) 4 Cent. Rep. 495 (competitive traffic between Pittsburgh and points reached through New York city); *State v. Atchison & N. R. Co.* (Neb.) 32 Am. & Eng. R. R. Cas. 888 (competitive traffic between Lincoln, Neb., and points in Kansas); *Thouren v. East Tennessee, V. & G.*

For the cases on contracts in restraint of trade generally see *Leslie v. Lorillard*, 1 L. R. A. 456, note, 110 N. Y. 519; *People v. North River Sugar Ref. Co.* 2 L. R. A. 33, 22 Abb. N. C. 164.

Combinations of corporations and firms in the nature of conspiracies, and against public policy, are illegal.¹

That contracts in restraint of trade are void, see *Leslie v. Lorillard*, 1 L. R. A. 443, 110 N. Y. 519.

In many states statutes have been passed directed to combinations in the form of trusts, to restrict production, competition and control trade.²

Under the Missouri Anti-Trust Act, as construed by the attorney-general of that State some 700 corporations under state charter were, Nov. 15, 1890, subject to have their charters declared revoked by the secretary of state for failure to file before that date affidavits that they were in no way connected with a trust or combination to fix prices. Every patent medicine manufactory, fixing the limit at which its goods could be resold by its vendee, came within the statute as interpreted by the attorney-general.

The following is the full text of the anti-trust bill which has recently been passed by the Illinois Legislature and approved by the Governor, taking effect July 1, 1891:—

“If any corporation, organized under the laws of this or any other State or county, for transacting or conducting any kind of business in this State, or any partnership or individual or other association of persons, whosoever, shall create, enter into, become a member of or party to any pool, trust, agreement, combination, confederation, or understanding, with any other corporation, partnership, individual, or any other person, or association of persons, to regulate or fix the price of any article of merchandise or com-

R. Co. (Ch. Ct. Tenn.) 5 Ry. & Corp. L. J. 77 (competitive traffic between points in Tennessee and points in adjoining states). See also *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *Hartford & N. H. R. Co. v. N. Y. & N. H. R. Co.* 3 Robt. 411 (competitive traffic between New Haven, Conn., and points in Massachusetts); *Morgan v. Donovan*, 58 Ala. 241 (competitive traffic between Mobile, Ala., and New Orleans, La.) As to foreign commerce, see *Murray v. Vanderbilt*, 39 Barb. 140.

¹See *People v. North River Sugar Ref. Co.* 2 L. R. A. 33, 22 Abb. N. C. 164.

²Kansas Laws 1889, chap. 257, p. 389; Maine Laws 1889, chap. 266, p. 235; North Carolina Laws 1889, chap. 374, p. 372; Tennessee Laws 1889, chap. 250, p. 475; Texas Laws 1889, chap. 117, p. 141; Dominion of Canada Laws 1889, chap. 41, p. 157; Statutory Enactments against Trusts, 28 Cent. L. J. (1889) 533; Missouri Trust Law, 30 Cent. L. J. 1840, 1.

modity, or shall enter into, become a member of, or party to, any pool, agreement, contract, combination, or confederation to fix or limit the amount or quality of any article, commodity, or merchandise to be manufactured, mined, produced or sold in this State,—such corporation, partnership, or individual, or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this Act. It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer, or employé, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees with the intent to limit or fix the price or lessen the production of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article. If a corporation or company, firm or association shall be found guilty of a violation of this Act, it shall be punished by a fine in any sum not less than \$500 nor more than \$2,000 for the first offense, and for the second offense not less than \$2,000 nor more than \$5,000, and for the third offense not less than \$5,000 nor more than \$10,000; and for every subsequent offense and conviction thereof shall be liable to a fine of \$15,000, provided that in all cases under this Act either party shall have the right of trial by jury. Any president, manager, director or other officer or agent or receiver of any corporation, company, firm or association, or any individual found guilty of a violation of the first section of this Act, may be punished by a fine of not less than \$200 nor to exceed \$1,000, or to be punished by confinement in the county jail not to exceed one year, or both, in the discretion of the court before which such conviction may be had. Any contract or agreement in violation of any provision of the preceding section of this Act shall be absolutely void. Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections

of this Act shall not be liable for the price or payment of such article or commodity, and may plead this Act as a defense to any suit for such price or payment. The fines hereinbefore provided for may be recovered in an action of debt in the name of the people of the State of Illinois. If upon the trial of any cause instituted under this Act to recover the penalties as provided for in section 3, the jury shall find for the people, and that the defendant has been before convicted of a violation of the provisions of this Act, they shall return such finding with their verdict, stating the number of times they find the defendant so convicted, and shall assess and return with their verdict the amount of the fine to be imposed upon the defendant in accordance with said section 3: provided, that in all cases under the provisions of this Act, a preponderance of evidence in favor of the people shall be sufficient to authorize a verdict and judgment for the people. It shall be the duty of the prosecuting attorneys in their respective jurisdictions, and the attorney-general, to enforce the foregoing provisions of this Act, and any prosecuting attorney of any county securing a conviction under the provisions of this Act shall be entitled to such fee or salary as by law he is allowed for such prosecution. When there is a conviction under this Act, the informer shall be entitled to one fifth of the fine recovered, which shall be paid to him when the same is collected. All fines covered under the provisions of this Act shall be paid into the county treasury of the county in which the suit is tried, by the person collecting the same in the manner now provided by law, to be used for county purposes."

The law of 1877 relating to conspiracy, known as the "Cole Boycott Act" was repealed at the same session the above law was passed, and a law was also enacted permitting railroads connecting with roads of other states to buy and hold stock and securities in such roads.

The Act of Congress has been cited heretofore, section 52.

Under the form of a "trust" a combination is formed, that attempts to prevent competition by uniting the controlling corporations, partnerships or individuals, engaged in any special industry or enterprise, and placing the interest, property and power of the combination, under the control of a few individuals,

or possibly in one hand, a trustee. This combination, in virtue of its concentration of power, can crush all competition. It reduces prices where the effort is made to compete, and when the field is clear it advances its demands, regulating the supply, not by the natural use, but by the price that can be forced from the public necessity. Like the partnership among corporations, its sole motive, the one purpose of its existence, is to obtain absolute control of the market, and, unrestrained by competition, fix the price of its productions as its selfish greed may prompt it. Such combinations are void at common law between individuals, and invade every principle of corporate existence.

Indeed any corporate act contemplating any object violative of supreme law is void,¹ and corporations which have been formed under general laws for purposes inconsistent with the general policy of the State or yet public morals, have been declared by the courts to be illegal.²

And charters for such purposes have been refused by the state legislatures.³

Agreements whereby the due performance of public duties is endangered or prevented, are illegal.⁴

Contracts whereby corporations disable themselves from performing their chartered duties are void as against public policy.⁵

A centralization of corporate franchises in a single irresponsible power furnished with every delegated facility for regulating and controlling at will, throughout the country, the production and price of a necessary article of commerce, creates a monopoly in a legal sense, and is detrimental to the public and unlawful.⁶

¹*James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151; *Trustees of N. C. Endow. Fund v. Satchwell*, 71 N. C. 111.

²*Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632; *People v. Chicago Gas Trust Co.* 8 L. R. A. 497, 180 Ill. 288.

³*Re Helping Hand Marriage Asso.* 15 Phila. 644; *Re Mutual Aid Asso.* 15 Phila. 625.

⁴*Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411; *Stanton v. Allen*, 5 Denio. 435; *Charlton v. Newcastle & C. R. Co.* 5 Jur. N. S. 1096; *St. Louis v. St. Louis Gaslight Co.* 5 Mo. App. 484.

⁵*Thomas v. West Jersey R. Co.* 101 U. S. 83, 25 L. ed. 953; *York & M. L. R. Co. v. Winans*, 58 U. S. 17 How. 30, 15 L. ed. 27; *St. Louis v. St. Louis Gaslight Co.* 5 Mo. App. 484; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 414; *Stanton v. Allen*, 5 Denio, 435.

⁶*People v. North River Sugar Ref. Co.* 2 L. R. A. 33, 22 Abb. N. C. 164, 5 L. R. A. 387, 54 Hun, 354.

In *People v. North River Sugar Ref. Co.* the case was that seventeen corporations, in at least six different states, all engaged in the sugar refining business, arranged to transfer their stock to a board of eleven members and were to receive in return from the association shares of stock to be issued by it and to be distributed among the several corporations in proportion to the amounts of stock held by them. The profits of the business were to be divided among the holders of certificates for shares issued by the board. No limit for the duration of the association was named, and its capital stock was fixed at \$50,000,000. A suit was brought by the attorney-general in the name of the people of New York against one of the associate corporations to vacate and annul its charter for "abuse of its powers," and for exercising "privileges or franchises not conferred upon it by law" by participating "in a combination with certain sugar refineries." Upon both grounds the court found against the defendant, and that the defendant had disabled itself from exercising its functions and employing its franchises, as it was intended it should by the Act under which it was incorporated, and had by the action which was taken placed itself in complete subordination to another and different organization, to be used for an unlawful purpose detrimental and injurious to the public. This was a subversion of the object for which the company was created, and it authorized the attorney-general to maintain and prosecute this action to vacate and annul its charter.

It was there ruled that any combination, the tendency of which is to prevent competition in its broad and general sense and to control, and thus at will enhance, prices to the detriment of the public, is a legal monopoly. And this rule is applicable to every monopoly whether the supply be restricted by nature or susceptible of indefinite production. The difficulty of effecting the unlawful purpose may be greater in the one case than in the other, but it is never impossible. Nor need it be permanent or complete. It is enough that it may be even temporarily and partially successful. The question in the end is, does it inevitably tend to public injury?

In affirming this decision the Court of Appeals declares that the evidence discloses that the defendant corporation has become an

integral part and element of a combination which possesses over it an absolute control, and dictates the extent and manner and terms of its entire business activity. All its stock is in the central association, denominated a "Board of Trustees," and consisting of only eleven individuals, who took and distributed to its own stockholders certificates of the board carrying a proportionate interest in what it describes as its capital stock. The defendant corporation has lost the power to make a dividend, and is compelled to pay over its net earnings to the master whose servant it has become. Under the order of that master it has refused to refine sugar, and by so much has lessened the supply upon the market. It cannot stir unless the master approves, and yet is entitled to receive from the earnings of the other refineries, amassed as profits in the treasury of the board, its proportionate share for division among its own stockholders, who now own the substitute certificates. In return for this advantage it has become liable to be mortgaged, not for its own corporate benefit alone, but to supply with funds the controlling board when that board reaches out for other coveted refineries.

If what has happened is that the stockholders of this corporation, one or many, sold absolutely to the board their entire stock, and the latter have merely chosen directors in their own interest and are managing the property as absolute owners may, then it is difficult to see wherein the corporation has sinned or what it has done, more than for a time to omit to do business.

On the other hand, it is contended that there never was a sale, but a trust constituted by mutual agreement; that they who agreed were the whole body of stockholders, in each corporation, necessarily representing and binding the corporation itself; that they transferred their shares to the board upon the trusts declared in the deed; that the certificates issued by the board were the formal declaration of the trust; that the corporate stockholders parted with the legal title of their stock to the chosen trustees with the power to vote upon it, but retained its beneficial ownership through the operation of the certificates, and so the corporation entered into partnership with the board of control.

In construing these two theories the court says that in contracts the buyer, which, in this case, was the board, should bind itself

to a contract of sale, but, according to the stockholders, this was not done, the board fixing no price. In this case the stockholders alone fixed the price and the vendees did not sign the contract, but left it to be supplied by inference of their action. The stockholders allowed the board, however, to fix the price of the corporation's personal property. In the light of these events the board was simply an agent, which is the characteristic of a trust. The action which placed the stock in the hands of the board of trustees shows that no sale was intended, but simply a transfer in trust. This is also proved by the mortgage clause. No absolute owner requires any permission whatever to mortgage his property, but here in their contract the supposed buyers are authorized to put a mortgage on the property of this corporation. Notwithstanding that the board itself had no capital or power to mortgage property, twenty refineries are found willing to put themselves under its control. This constitutes a trust.

A résumé of the proceedings on the part of the corporation preparatory to its joining the trust is then given.

The history shows that there was corporate action on the part of the North River Sugar Refinery Company which bound it. The corporation thus became an element of the trust. The way the companies could have prevented the trust being founded was by refusing to register or to recognize the illegal transfer of that stock, and they should have refused to register the transfer upon their books, appealing to the law to sustain them, thus shattering the trust at the outset of its career. To be lawful all corporate acts should have been done by all of the various company stockholders and trustees instead of by the board of trustees alone. The question to be determined is whether the conduct of the defendant in aiding to form the trust was illegal. In all of these points which have been reviewed it is found that the corporation was doing the public an injury, and in avoiding the state law which compels reservation of corporate rights had proved unfaithful to its charter. It is a violation of law for a corporation to enter into a partnership, as shown in the case of *Whittenton Mills v. Upton*, 10 Gray, 596, which furnishes the reasons at length.

If the trust had been properly formed as a corporation under the laws the twenty separate companies would have been dissolved

and not have remained in existence as in this case. The present corporation or trust puts upon the market a capital stock proudly defiant of actual values and capable of unlimited expansion. It is one thing for the State to respect the rights of ownership and quite another thing to add to the possibility of a further extension of those consequences by creating artificial authority in the management of such aggregations. If corporations can combine and mass their forces in a solid trust with little added risk to capital already in, without limit to magnitude, a tempting and easy road is open to enormous combinations vastly exceeding in number and strength any possibilities of individual ownership. The State seeks to protect individuals rather than combinations.

It is concluded that the defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in respect so material and important as to justify a judgment of dissolution. Without either approval or disapproval of the views expressed by the court below it was decided that in that State there can be no partnerships of separate and independent corporations, whether directly or indirectly, through the medium of a trust, no substantial consolidations, which avoid and disregard the statutory provisions and restraints; but that manufacturing corporations must be and remain several as they were created, or one under the statute.¹

In a recent case, that of *People v. Chicago Gas Trust Co.* 8 L. R. A. 497, 130 Ill. 268, the trust combination consisted of a new corporation holding a separate charter under the General Incorporation Law of Illinois. In applying for its charter the Gas Trust Company stated the objects of its incorporation to be "the erection and operation of works in Chicago and other places in Illinois for the manufacture, sale, and distribution of gas and electricity; and to purchase and hold or sell the capital stock of any gas or electric company or companies in Chicago or elsewhere in Illinois." Having received its charter the company purchased a majority of the capital stock of each of the gas companies doing business in Chicago, four in number.

¹*People v. North River Sugar Ref. Co.* 9 L. R. A. 38, 121 N. Y. 593. See *People v. American Sugar Ref. Co.* (Cal.) 7 Ry. & Corp. L. J. 88; *State v. American Cotton Oil Trust*, 40 La. Ann. 8; *State v. Nebraska Distillery Co.* 29 Neb. 700.

By so purchasing and holding a majority of the shares of the capital stock of each of the four companies, the appellee usurped and exercised powers, liberties, privileges, and franchises not conferred by law.

By purchasing and holding such stock it secured the control of each of the companies; and such control by the appellee, an outside and independent corporation, suppresses outside competition between them and destroys their diversity of interest and all motive for competition. There is thus built up a virtual monopoly in the manufacture and sale of gas. It was held that a corporation thus formed for the purpose of manufacturing and selling gas has no power to purchase and hold or sell shares of stock in other gas companies, as an incident to the purpose of its formation, even though such power is specified in its articles of incorporation.

The agreement by stockholders to place their stock for three years in the hands of trustees with power in them to vote upon it at all meetings, the stock to be sold only subject to the agreement, and to one another in preference to a third person, if the price offered for it by outside parties can be obtained—is a contract in restraint of trade and not enforceable in equity.¹

A lumber trust agreement by which a corporation contracts to make and deliver to the other party, within a specified time, a certain amount of lumber, and agrees not to make any other lumber for sale within a specified territory, and to pay the other party a fixed sum per thousand feet for all lumber made and sold for outside parties, the purpose of the agreement being to limit the output of lumber and so increase its price, and to give the parties entire control of the lumber market within the specified territory—is a contract in restraint of trade and therefore void, and being indivisible it must altogether fall.²

Innumerable cases might be cited to sustain the proposition that combinations created to defeat competition, especially among those engaged in business impressed with a public or quasi public character, are manifestly prejudicial to the public interests and are void.³

¹*Moses v. Scott*, 84 Ala. 608.

²*Santa Clara Valley Mill & L. Co. v. Hayes*, 76 Cal. 387.

³*People v. Chicago Gas Trust Co.* 8 L. R. A. 497, 130 Ill. 268; *People v. North River Sugar Ref. Co.* 2 L. R. A. 33, 22 Abb. N. C. 164; *Morris Run Coal Co.*

Not only is such an incorporation for such an illegal purpose void, but such a trust is ineffective and null in its inception and in itself, under the law of trusts, for *in pari delicto melior est conditio possidentis, et defendantis*, is a maxim of public policy equally respected in courts of law and courts of equity, and the cunning of counsel cannot so cover a transaction under the mantle of a trust, which is in fact against public morals or public policy, that equity will not disclose the concealed iniquity.¹

And when the illegal purpose is disclosed, whether the shelter be under form of partnership of individuals, or of corporations, the grasp of a court of equity will be equally powerful to control the trust. Certainly the mere form of a partnership will not enable a trust to work an evil in the community. A partnership, when its purposes are contrary to sound morality and public policy, and are attempted to be worked out by fraud and deceit is within the reach of a court of equity.

The language of a written agreement between corporations is not alone to be consulted in determining whether the agreement is or is not an illegal attempt to prevent competition and control the market; but it is to be considered in view of the circumstances and of the conduct and probable motives of the individuals engaged in bringing it about.²

Where corporations are formed for the purpose of performing some service for the public, and to enable the corporation to act, it must obtain the right to use the streets of a city upon conditions contained in the grant, it cannot disable itself from complying with such conditions, or discharging its duty to the public, by

v. Barclay Coal Co. 68 Pa. 173; *Central R. Co. v. Collins*, 40 Ga. 582; *Stanton v. Allen*, 5 Denio, 434; *Hooker v. Vandewater*, 4 Denio, 349; *Craft v. McConoughy*, 79 Ill. 346; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 8 Robt. 411; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 643, 82 L. ed. 819; *Trist v. Child*, 88 U. S. 21 Wall. 441, 23 L. ed. 628; *Irwin v. Willard*, 110 U. S. 499, 28 L. ed. 225; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Central Ohio Salt Co. v. Guthrie*, 85 Ohio St. 666; *Woodruff v. Berry*, 40 Ark. 261.

¹*People v. Chicago Gas Trust Co.* 8 L. R. A. 497, 180 Ill. 268.

²*People v. North River Sugar Ref. Co.* 5 L. R. A. 387, 54 Hun, 354, 2 L. R. A. 38, 23 Abb. N. C. 164. See *Holman v. Johnson*, Cowp. 341; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258, 6 L. ed. 468; *Hannay v. Eve*, 7 L. ed. 8 Cranch, 242, 2 L. ed. 427; *Grounds and Rudiments of the Law*, M. 347, p. 260, ed. 1751, 7 Dane's Abridg. chap. 226, art. 18; *Smith v. Bromley*, 2 Dougl. 696, note, 1 Story, Eq. Juris. 69, 70, and note, p. 70.

parting with the power of self-government and control or merging itself without express authority of law in another corporation.

Thus, gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets whose fee is held by the municipal corporation, in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain.¹

In *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, the Supreme Court of the United States, in an able opinion delivered by *Mr. Chief Justice* Fuller, uses these words: "These gas companies entered the streets of Baltimore under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated."

The privileges awarded to the gas companies under their respective charters were given them in return for and in consideration of services to be rendered by them to the public. When they entered the streets they assumed the performance of the public duty of furnishing light to the inhabitants. That they should be permitted or required or forced to abandon the performance of such public duty is against the policy of the law. The public duty is imposed upon each company separately, and not upon them combined. Each for itself, when it accepted the articles of association, assumed an obligation to perform the objects of its incorporation. But the corporation which stands for the combined corporations, through the control which it does or may exercise over the companies by reason of its ownership of a majority of their stock, renders it impossible for them to discharge their public duties, except at the dictation of an outside force, and in the manner prescribed by a corporation operating independently of them. They are thus virtually forced to abandon the performance of their duty to the public. The freedom and effectiveness of their action in carrying out the purposes of their creation are seriously interfered with, if not actually destroyed. A power whose exercise leads to such a result cannot be lawfully intrusted to any corporate body.²

¹*Chicago Gaslight & C. Co. v. People's Gaslight & C. Co.* 11 West. Rep. 63, 121 Ill. 530.

²*People v. Chicago Gas Trust Co.* 8 L. R. A. 497, 130 Ill. 268.

An agreement between corporations engaged in the manufacture of cotton-seed oil, to select a committee from each corporation, and to turn over to this committee the properties, including the entire operative machinery of each company, to be managed and operated for a specified term by the committee, for the common benefit, the profits and losses to be shared in agreed proportions, is not a mere "traffic arrangement," but a contract of partnership, which is *ultra vires* and consequently void so far as it is unexecuted, even though it be authorized by both shareholders and directors.¹

It is the general rule that corporate franchises are granted upon a trust or condition that the corporate privileges shall not be abused; that the corporation undertakes and agrees, upon condition of forfeiture, that it will so manage and conduct its affairs that it shall not become dangerous or hazardous to the safety of the State or community in and with which it transacts business;² and that the franchise may be forfeited and the corporation dissolved for acts *ultra vires*, or for breach of the trust condition and perversion of the objects of the grant.³

But to warrant a forfeiture of franchise for misuser, the misuser must be such as to work or threaten a substantial injury to the public.

A corporation violating the Organic Law forfeits its franchise, but does not thereby become subject to the escheat or confiscation of its property.⁴

To justify such forfeiture the *ultra vires* acts must be so substantial and continued as to so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created.⁵

¹*Mallory v. Hanaur Oil Works*, 86 Tenn. 508.

²*Ward v. Farwell*, 97 Ill. 598.

³*Chicago L. Ins. Co. v. Needles*, 118 U. S. 574, 28 L. ed. 1084; *People v. Dispensary & H. Society of the Women's Inst.* 7 Lans. 304; *People v. Bristol & R. Turnp. Road*, 28 Wend. 235; *People v. Fishkill & B. Pt. Road Co.* 27 Barb. 445; *State v. Milwaukee, L. S. & W. R. Co.* 45 Wis. 590; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 1, 106; *People v. North River Sugar Ref. Co.* 2 L. R. A. 33, and note, 54 Hun, 355.

⁴*Com. v. New York, L. E. & W. R. Co.* 7 L. R. A. 634, 133 Pa. 591.

⁵*State v. Minnesota Thresher Mfg. Co.* 3 L. R. A. 510, 40 Minn. 213.

§ 60. General Acts of Incorporation will not Authorize the Formation of Trusts.—No court could construe a general Act for the incorporation of associations to authorize one hostile in its purpose to the life of the State, or to its declared or recognized policy. Indeed if the state Constitution oppose the purpose of the intended incorporation, the Act authorizing it would be as void as would be that of a State, in chartering a corporation to resist the authority of the general government.¹

Certainly no special charter was ever granted to create a combination to rob the public by destroying competition in production or sale. General statutes do not contemplate or authorize the organization of a corporation for such a purpose.

Since a sugar-refining company organized to create a trust or monopoly is unlawful, the franchises of a refining company are subject to forfeiture if it surrenders its business to such monopoly and becomes a party to the trust.²

It is a condition on which a corporation is allowed to be created and maintained that it shall exercise and use its franchises for the benefit of the public. And when it voluntarily declines to do that, or places itself in a situation in which that may be prevented as a consequence of its voluntary action, under the statute, as well as the decisions of the courts, its charter may be annulled. If it has disabled itself for exercising its functions and employing its franchises as it was intended it should by the Act under which it was incorporated, and has placed itself in complete subordination to another and different organization to be used for an unlawful purpose, detrimental and injurious to the public; if instead of manufacturing its product and disposing of it to the public on what might be fair competitive prices, it has become a party to a combination, in part, at least, designed to create a monopoly and exact from the public prices which could not otherwise be obtained, this is a subversion of the object for which the company was created and it authorizes the attorney-general to maintain and prosecute an action to vacate and annul its charter.³

¹*Trustees of N. C. Endow. Fund v. Satchell*, 71 N. C. 111; *Chicora Co. v. Crews*, 6 S. C. 243.

²*People v. American Sugar Ref. Co.* (Cal.) 7 Ry. & Corp. L. J. 83.

³*People v. North River Sugar Ref. Co.* 5 L. R. A. 387, 54 Hun, 354.

Indeed it may well be questioned whether it is not against the policy of the State creating a corporation and giving its stockholders power to vote their stock, to permit them to deprive themselves of that power by placing the stock in a trust, with power in the trustee to vote the stock for any definite or indefinite period. It is the policy of the law that ownership of stock shall control the property and management of the corporation, and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will in the important matter of voting and suffer themselves to be the passive instruments in the hands of some agent, who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation. This personal right to vote his stock is not given entirely for the protection of the stockholder himself, but it equally protects the interest of every stockholder, when each discharges the duty each owes his fellow stockholder, to use such power and means as the law and his ownership of stock gives him, so that the general interest of the stockholders is promoted and protected, and the general welfare of the corporation is sustained, and the business conducted by its agents, managers and officers, so far as may be upon prudent and honest principles of business and with just as little temptation to and opportunity for fraud, and the seeking of individual gains, at the sacrifice of the general welfare of the corporation, as is possible.¹ The case is far stronger where the voting trust is with trustees, whose personal interests in any way are hostile to the interests of the stockholders, as stockholders of the corporation whose stock the trustees vote.

When underlying a pooling contract, there is between the members of the syndicate, who are directors, or a majority of the directors of the corporation, a secret agreement or interest which enters into this pooling contract, and forms the object of its creation, and by which they are to take to themselves profits arising from contracts which they as directors make, elements of unfairness, and opportunity for fraudulent and dishonest practices are introduced which the courts cannot but condemn. Such pooling contract or voting trust is in violation of the most elementary

¹*Starbuck v. Mercantile Trust Co.* (Conn.) 9 Ry. & Corp. L. J. 208

principles of law governing the dealings of trustees with trust property and their *cestuis que trust*.¹ The union of corporations in partnerships involves many of these evil consequences.

The purpose for which a corporation is formed under general laws must be a lawful purpose. The formation of a corporation to purchase all the shares in other corporations competing with each other, to supply the public with some necessary or useful article, is not an organization for a lawful purpose, and all acts done towards the accomplishment of such object are illegal and void. The word "unlawful," as applied to corporations, is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do; or in other words, such acts, powers and contracts as are *ultra vires*.²

The business of manufacturing and distributing illuminating gas, by means of pipes laid in the streets of a city, is a business of a public character. It is the exercise of a franchise belonging to the State. The services rendered and to be rendered for such a grant are of a public nature. Companies engaged in such business owe a duty to the public. Any unreasonable restraint upon the performance of such duty is prejudicial to the public interest, and in contravention of public policy.³

Whatever tends to prevent competition between those engaged in a public employment or business impressed with a public character is opposed to public policy, and therefore unlawful. What ever tends to create a monopoly is unlawful, as being contrary to public policy.⁴

In *Craft v. McConoughy*, 79 Ill. 346, where the opinion was

¹*Barnes v. Brown*, 80 N. Y. 535; *Butts v. Wood*, 37 N. Y. 318; *Starbuck v. Mercantile Trust Co.* (Conn.) 9 Ry. & Corp. L. J. 208.

²*Franklin Co. v. Lewiston Sav. Inst.* 68 Me. 48; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 180 U. S. 1, 82 L. ed. 887.

³*Chicago Gaslight & C. Co. v. People's Gaslight & C. Co.* 11 West. Rep. 68, 121 Ill. 580; *Gibbs v. Consolidated Gas Co.* 180 U. S. 396, 82 L. ed. 979.

⁴2 Addison, Cont. 743; Greenhood, Pub. Pol. 180, 643, 654, 655, 670; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Craft v. McConoughy*, 79 Ill. 346; *Central R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah, G. & N. A. R. Co.* 48 Ga. 18; *West Virginia Transp. Co. v. Ohio River P. L. Co.* 22 W. Va. 600.

delivered by *Mr. Justice Craig*, it was said: "We understand it to be a well settled rule of law that an agreement in general restraint of trade is contrary to public policy, illegal and void. . . . Whatever is injurious to the interest of the public is void on the ground of public policy."

In *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, the Supreme Court of Ohio said: "Public policy unquestionably favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices to the injury of the general public."

It is the duty of the judiciary to refuse to sustain that which is against the public policy of the State, when such public policy is manifested by the legislation or fundamental law of the State.¹

It is, in most states, provided that the common law of England, so far as the same is applicable and of a general nature, shall be the rule of decision, and shall be considered of full force until repealed by legislative authority. Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good. This principle owes its existence to the very sources from which the common law is supplied.²

The common law will not permit individuals to oblige themselves by a contract either to do or not to do anything, when the thing to be done or omitted is in any degree clearly injurious to the public.³

In *Stanton v. Allen*, 5 Denio, 434, an agreement, whose tendency was to prevent competition, was held to be void by the principles of the common law, because it was against public policy, and injurious to the interests of the State. "Contracts creating monopolies are null and void as being contrary to public policy."⁴

All grants creating monopolies are made void by the common law.⁵

¹*Santa Clara Female Academy v. Sullivan*, 4 West. Rep. 114, 116 Ill. 375.

²*Greenhood*, Pub. Pol. 2, 3.

³*Chappel v. Brockway*, 21 Wend. 159; *West Virginia Transp. Co. v. Ohio River P. L. Co.* 22 W. Va. 600.

⁴2 Addison, Cont. 743.

⁵7 Bacon, Abr. 22.

In the *Case of the Monopolies*, 11 Coke, 84, it was decided, as long ago as the forty-fourth year of the reign of Queen Elizabeth, that a "grant to the plaintiff of the sole making of cards within the realm was utterly void, and that for two reasons: (1) that it is a monopoly, and against the common law; (2) that it is against divers acts of Parliament," etc.¹

Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted, and to accomplish the purposes of their creation.²

An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it.³

Where a charter, in express terms, confers upon a corporation the power to maintain and operate works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stocks. If the purpose for which a gas company has been created is to make and sell gas and operate gas-works, the purchase of stock in other gas companies is not necessary to accomplish such purpose. "The right of a corporation to invest in shares of another company cannot be implied, because both companies are engaged in a similar kind of business."⁴

It is true that a gas company might take the stock of another corporation in payment of a debt, or perhaps as security for a debt; but the actual purchase of such stock is not directly and immediately appropriate to the execution of a specifically granted power to operate gas-works and manufacture gas. Some corporations, like insurance companies, may find it necessary to keep funds on hand for the payment of losses by death or fire, or to meet other necessary demands; but it is questionable whether

¹*Bell v. Leggett*, 7 N. Y. 176; *Burke v. Child*, 88 U. S. 21 Wall. 441, 23 L. ed. 623.

²*Chicago, P. & S. W. R. Co. v. Marcellis*, 84 Ill. 643; *Chicago Gaslight & C. Co. v. People's Gaslight & C. Co.* 11 West. Rep. 63, 121 Ill. 530.

³*Hood v. New York & N. H. R. Co.* 22 Conn. 1; *Franklin Co. v. Lewiston Sav. Inst.* 68 Me. 48.

⁴1 Morawetz, Priv. Corp. § 431.

even these can invest their surplus funds in the stocks of other corporations without special legislative authority. But there is nothing in the nature of a gas company which renders it proper for such a company to accumulate funds for outside investment. Its surplus profits belong to the stockholders, and, when distributed among them, can be used by them as they see fit.

If, then, the power to purchase outside stocks cannot be implied from the power to operate gas-works, and make and sell gas, a company to whom the latter power has been expressly granted cannot exercise the former without legislative authority to do so. This is the law, as settled by the great weight of authority. Boone, on the Law of Corporations, says: "Without a power specifically granted or necessarily implied, a corporation cannot become a stockholder in another corporation, and especially where the object is to obtain the control or affect the management of the latter." § 107.

In Green's Brice's *Ultra Vires* (p. 91, *note b*) it is said: "In the United States a corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter, or necessarily implied in it."

So, also, 1 Morawetz on Private Corporations (§§ 431, 433) says: "A corporation has no implied right to purchase shares in another company for the purpose of controlling its management. . . . A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly, through persons acting as its agents or tools."

The authorities referred to by these text-writers sustain the conclusions announced by them. It has been held in many cases, that "in the United States corporations cannot purchase or hold or deal in the stocks of other corporations, unless expressly authorized to do so by law;" and that "one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute."¹

¹*Franklin Co. v. Lewiston Sav. Inst.* 68 Me. 48; *Franklin Bank v. Commercial Bank*, 86 Ohio St. 350; *Milbank v. New York, L. E. & W. R. Co.* 64 How. Pr. 20; *Sumner v. Marcy*, 8 Woodb. & M. 105; *New Haven, M. & W. M. Mut. Sav. Bank & Bldg. Assn. v. Meriden Agency Co.* 24 Conn. 159; *Central R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah, G. & N. A. R. Co.* 43 Ga. 13; *Berry v. Yates*, 24 Barb. 199.

Nor will the fact that a corporation is organized under a general act of incorporation authorize such purchase. The only powers granted by such acts are the ordinary corporate powers, such as the rights to be bodies corporate and politic, to sue and be sued, to have a common seal, etc.

The charter of a corporation formed under such a general law does not consist of the articles of association alone, but of such articles taken in connection with the law under which the organization takes place.¹ The provisions of the law enter into and form a part of the charter. It certainly cannot be true that a corporation formed under a general incorporation act, for a purpose other than that of dealing in stocks, can exercise the power of purchasing and holding stock in other corporations, where such power cannot be necessarily implied from the nature of the power specifically granted, and is not necessary to carry the latter into effect. The power to purchase and hold stock in other companies must be the subject of legislative grant, if not in all cases, at least in cases where it cannot be implied from the powers expressly granted. General incorporation laws contain no grant of such power. Can a corporation organized under that law be clothed with such a power by merely naming it in the statement filed with the secretary of state? Clearly not. The action of the secretary of state in issuing the license and the certificate of organization is necessarily, to a large extent, merely ministerial.²

Where the organization is for the purpose of erecting gas works and making and selling gas, that being the main purpose for which the corporation was formed, the incorporators could not tack on and connect with such main purpose the power to buy and hold stock in other gas companies, by merely describing such power in the statement. To hold that they could confer such power by writing it down in the statement would be to hold that the Legislature could clothe them with a part of its legislative functions. When a corporation is formed under a general incorporation act, for the purpose of carrying on a lawful business, the law, and not the statement or the license or the certificate, must

¹ Morawetz, *Priv. Corp.* § 318.

² *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837, 4 Am. & Eng. Enc. Law, title *Corporations*, p. 193, note 1.

determine what powers can be exercised as incidents of such business.

It has been held that the powers obtained by the corporations organized under general laws are necessarily restricted to those mentioned in the Act;¹ that in such cases the charter is void as to all powers and privileges granted beyond the provisions of the statute;² that, if unauthorized provisions are added to the articles of incorporation, all acts done pursuant to such provisions will be void;³ that anything in such articles not warranted by the statutes authorizing the formation of corporate bodies is void for want of authority,⁴ and that such articles must be construed strictly and against the grantee, and in favor of the government or the general public.

A corporation formed to erect works and manufacture gas under a general statute has no power to purchase and hold shares in other gas companies as an incident to the purposes of its formation, even though such powers are specified in its articles of incorporation.⁵

§ 61. Corporation Representing a Trust, cannot Act in Foreign Territory without Local Authority.—As the charter of a foreign corporation cannot confer any power upon it to do any act in another jurisdiction independent of the consent of the authority there existing, certainly such corporation can do no act in such jurisdiction contrary to its laws, or its policy.⁶ Nor can it usually assume powers in another State not granted to it in the State of its incorporation.⁷ Nor can such powers be conferred by the State within which it does business, by comity.⁸

A foreign and nonresident railroad corporation, being pro-

¹*Philadelphia Medical College Case*, 3 Whart. 445.

²*Heck v. McEwen*, 12 Lea, 97.

³*Eastern Pt. R. Co. v. Vaughan*, 14 N. Y. 546.

⁴*Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837.

⁵*People v. Chicago Gas Trust Co.* 8 L. R. A. 497, 180 Ill. 268.

⁶*Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 539, 10 L. ed. 284; *Milnor v. New York & N. H. R. Co.* 53 N. Y. 363; *Lewis v. Bank of Kentucky*, 12 Ohio, 132, 40 Am. Dec. 469; *Stetson v. City Bank of New Orleans*, 2 Ohio St. 174; *Blair v. Perpetual Ins. Co.* 10 Mo. 559, 47 Am. Dec. 129.

⁷*Starkweather v. American Bible Soc.* 72 Ill. 50, 22 Am. Rep. 133.

⁸*Diamond Match Co. v. Powers*, 51 Mich. 145; *White v. Howard*, 46 N. Y. 144.

hibited by the Constitution from acquiring a right of way in Nebraska, cannot do so indirectly through a Nebraska corporation,¹ and if a foreign corporation is guilty of wrong within a State, it is liable to the jurisdiction of its courts if processes can be served upon an officer or agent, and its action can be restrained.²

¹*Koenig v. Chicago, B. & Q. R.* 16. 27 Neb. 699.

²*Carr v. Tabor Boiler Works*, 15 Fed. Rep. 433.

CHAPTER XIII.

CONSPIRACY AT COMMON LAW.

- § 62. *Conspiracy as an Offense, of Common Law Origin.*
- 63. *Common Law Origin of the Offense of Conspiracy Shown from the Villenous Judgment.*
- 64. *Common Law Origin of Offense of Conspiracy. As it Appears from Precedents and Decisions.*
- 65. *Conspiracy Defined.*
- 66. *Conspiracy against Civil Government.*
- 67. *Conspiracies Affecting the Public Injuriouly or against the Public Quiet.*
- 68. *Conspiracy against the Due Administration of Justice.*
- 69. *Conspiracies against Public Virtue and Individual Morality, Indictable.*
- 70. *Combinations to Cheat.*

§ 62. Conspiracy as an Offense, of Common Law Origin.—

As the purpose of the common law, is to regulate for the common good the conduct of man in his social relations and intercourse with his fellows, all attempts to oppress and injure the individual and deprive him of his personal freedom of action or of his property, by combining wealth and influence for this purpose or for selfish purposes, are looked upon as common law crimes.¹

It was early recognized, that the power of many united for mischief against one is so great, that the law should protect him.²

To guard against the union of numbers to effect an unlawful design is not easy and to punish the offenders is often difficult. The unlawful confederacy is therefore punished to prevent the doing of any act in execution of it.³

Combinations for laudible objects are favored by the law, and combinations of workmen to better their condition by legitimate

¹*Johnson v. State*, 26 N. J. L. 818; *Reg. v. Carlisle*, 6 Cox, C. C. 866.

²*Reg. v. Duffield*, 5 Cox, C. C. 482; *State v. Rowley*, 12 Conn. 112; *Com. v. Carlisle*, Brightly, 86.

³*Com. v. Judd*, 2 Mass. 829.

and fair means are commendable and to be encouraged as promoting social and commercial prosperity.¹

But combinations for evil purposes, whether by one class of men or another, are detrimental to the public weal, and cannot be regarded with favor by the courts.²

The offense of conspiracy being therefore violative of the principles of common law, is of common law origin, and it is not restricted or abridged by the Statute of 33 Edw. I., 2 Coke Inst. 561. This result is reached also upon authority, with the following review of the early decisions; (see also Buchanan, *J.*, in *State v. Buchanan*, 5 Har. & J. 317; Parsons, *Ch. J.*, in *Com. v. Judd*, 2 Mass. 329, in 1807; Tindal, *Ch. J.*, in *O'Connell v. Reg.* 11 Clark & F. 155, 233), and by an examination of later cases.

In *O'Connell's Case*, 11 Clark & F. 155, the statement was made by Tindal, *Ch. J.*, in giving his opinion before the House of Lords: "That it (conspiracy) was an offense known to the common law, and not first created by 33 Edw. I., is manifest."

§ 63. **Common Law Origin of the Offense of Conspiracy Shown from the Villenous Judgment.**—In 3 Coke, Institutes, 143, and 1 Hawk, P. C. 193, chap. 72, § 9, it is said that the "villenous" judgment is given by common law and not by any statute against those convicted of a conspiracy. As this "villenous" judgment was known only to the common law, it could only follow a common law offense. In the 20th year of Edward I., a civil remedy was provided against conspirators, etc., by the writ of conspiracy; and the Statute 28 Edw. I., chap. 10, entitled "The Remedy against Conspirators, False Informers and Embracers of Juries" makes this further provision: "In right of conspirators, false informers, and evil procurers of dozens, assizes and juries, the king hath provided remedy for the plaintiffs by writ out of chancery; notwithstanding he willeth that his justices, of the one bench and of the other, and justices assigned to take assizes, when they come into the country to do their office, shall upon every plaint made unto them, award inquests thereupon without writ, and shall do right unto the plaintiffs without delay." The first clause of this statute can only refer to the provision in 20th

¹*Reg. v. Rowland*, 5 Cox, C. C. 490.

²*State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 46.

Edward I. for the writ of conspiracy, there being no other, and this according to 2 Inst. 562, was but an affirmance of the common law; and these provisions for private remedies against conspirators clearly admit the existence of the offense of conspiracy at common law. But the statute itself in defining who are conspirators in certain cases, without declaring the conspiracy unlawful, or forbidding it, or providing a punishment therefor, plainly recognized the prior existence of the crime and its punishment at common law. Nor does the statute cover all conspiracies at common law,—as conspiracies to commit a felony or a misdemeanor, nor is the statute prohibitory, nor is the existence of other punishable conspiracies than those it enumerates in any way repugnant to or inconsistent with any of its provisions.

The case of *Breerton v. Townsend*, Noy's Rep. 103, for the suppression of a will, in which the parties were punished by fine, also shows that the villenous judgment was not given in all cases of conspiracy, but that there were at common law different degrees of punishment, and consequently of crime; and in 1 Hawk, P. C. 193, chap. 72, § 9, it is said that it has never been settled to be the proper judgment upon any conviction of conspiracy, except such as threatening the life of the party, which obviates any argument drawn from the villenous judgment, against there being any other conspiracies at common law than those enumerated in the statute 33 Edward I. The statute is rather by way of superadding to the offenses at common law. This is shown by the action of the courts again and again in the early cases, in overruling the objection that the offense for which the defendants were on trial was not one named in the statute.

§ 64. **Common Law Origin of Offense of Conspiracy. As it Appears from Precedents and Decisions.**—In the Book of Assises, 27 Edward III., chap. 44, it is said that “inquiry shall be made concerning conspirators and confederates, who bind themselves by oath, covenant or other agreement, that each will support the enterprises of the other whether true or false.” And in another place it is stated: “And note that two were indicted for a confederacy, each of them to maintain the other, whether the matter be true or false; and notwithstanding that nothing was

alleged to have been actually done, the parties were put to answer because it was a thing forbidden by law."¹

Clearly this offense does not fall within the Statute 33 Edward I., but under common law.²

And it does not charge a conspiracy to commit the common law offense of "maintinance." That is defined as an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend his action. "The offense is against public justice . . . and perverts the remedial process of the law into an engine of oppression."³

It is the assisting of another person in a lawsuit, without having any privity or concern in the subject.⁴

The intermeddling of a stranger in a suit for the purpose of stirring up and continuing the litigation.⁵

The actual offense charged in the case stated in the note was the "agreement that each will support the enterprises of the other whether true or false," not the lawsuits of the other, for it does not appear that either had actions pending or to be brought, and it does not affirmatively appear that "nothing was alleged to have been actually done," and therefore the offense could not have been made out if the charge was simply "maintenance," for that consists in actually doing the thing—"maintaining or assisting either party, with money or otherwise to prosecute or defend"—not in conspiring or agreeing to do it. Indeed it has been expressly decided that a parent might uphold his child, and a master assist his servant, in a lawsuit (1 Bl. Com. 429, 450), without being guilty of maintainance. It required no decision to hold them harmless, for sustaining those thus connected with them, in ordinary enterprises. That the "*Anon*" case in the year 1354 was not one charging a conspiracy for "maintenance" clearly appears from the language used in referring to it two hundred and

¹ *Anon*, A. D. 1354, Book of Assizes, p. 138. b. pl. 44, 27 Edward III.

² Hawk, P. C., 190, chap. 73.

³ 1 Bl. Com. 185; *Christie v. Sawyer*, 44 N. H. 303; *Andrews v. Thayer*, 30 Wis. 233; *Stanley v. Jones*, 7 Bing. 369.

⁴ *Wickham v. Conklin*, 8 Johns. 223; *Gilman v. Jones*, 4 L. R. A. 113, 87 Ala. 691.

⁵ 2 Pars. Cont. 766; *Dorwin v. Smith*, 35 Vt. 69; Anderson, Law Dict. title *Maintenance*; *Andrews v. Thayer*, 30 Wis. 233.

fifty-seven years later in the year 1611 in *The Poulterer's Case*, 9 Rep. 55, Moore, 814, where the defendants, poulterers of London, were indicted for a combination and confederacy falsely and maliciously to charge the plaintiff with the robbery of one of the defendants, and to procure him to be indicted, convicted and hanged, and although the grand jury found *ignoramus*, yet it was held that although a writ of conspiracy lies not unless the party is indicted, and *legitimo modo acquietatus*, for so are the words of the writ; but that a false conspiracy betwixt divers persons shall be punished, although nothing be put in execution, is full and manifest in the books; and therefore, in 27 Bk. Assizes, p. 44, in the "Articles of the Charge of Enquiry by the Enquest in the King's Bench," there is a *nota*, that two were indicted for confederacy, each of them to maintain the other, whether their matters be true or false, and notwithstanding that nothing was supposed to be put in execution, the parties were forced to answer to it, because the thing is forbidden by law, which are the very words of the book; which proves that such false confederacy is forbidden by the law, although it was not put in use or executed. So there in the next articles in the same book, inquiry shall be made of conspirators and confederates who agree amongst themselves, etc., falsely, to indict, or acquit, etc., the manner of agreement and betwixt whom; which proves also that confederacy to indict or acquit, although nothing is executed, is punishable by law; and there is another article concerning conspiracy between merchants, and in these cases the conspiracy or confederacy is punishable although the conspiracy or confederacy be not executed; and it is held in 19 R. 2 Brief, 926, a man shall have a writ of conspiracy, although they do nothing but conspire together and he shall recover damages, and they may be also indicted therefor. Also the usual commission of *oyer and terminer* gives power to the commissioners to inquire, etc., *de omnibus coadunationibus, confederationibus, et falsis alligantiis*; and *coadunatio*, is a uniting of themselves together; *confederatio* is a combination among themselves, and *falsa alligantia* is a false binding each to the other, by bond or promise, to execute some unlawful act. In these cases before the unlawful act is executed, the law punishes the coadjunction, confederacy or false alliance, to the end to prevent the unlawful act,

quia quando aliquid prohibetur, prohibetur et id per quod pervenitur ad illud; et effectus punitur licet non sequatur effectus; and in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it. And afterwards upon hearing of the case and upon pregnant proofs the defendants were sentenced for such false conspiracy by fine and imprisonment.

To this case is a note by *Lord Coke*, "that these confederacies, punishable by law, before they are executed, ought to have four incidents: 1. It ought to be declared by some manner of prosecution, as in this case it was, either by making of bonds, or promises one to another. 2. It ought to be malicious, as for unjust revenge, etc. 3. It ought to be false, against an innocent. 4. It ought to be out of court voluntarily."

If the indictment in the *Anon. Case*, 1354, 27 Assizes, p. 138, b. pl. 44, falls within either of the provisions of the Statute 33 Edw. I., it can only be that which relates to the moving and maintaining pleas, and that does not embrace it; for if the indictment had been under the statute, for a confederacy "falsely to move and maintain pleas," of course in a court, the parties must have gone acquit, for no such purpose was charged. The indictment was not however under the statute for either of the specific acts mentioned in it, but at common law for the conspiracy, which was considered *per se* a substantive offense, no act in furtherance of it being alleged, and this after and notwithstanding the statute. From the positions that "a confederacy each to maintain the other, whether the matter be true or false," is a common law offense; that conspiracies are punishable at common law, though nothing be put in execution; and that the law punishes the conspiracy "to the end to prevent the unlawful act," and, referring to the combinations among merchants to regulate the price of wool, that "the conspiracy or confederacy (not the false conspiracy or confederacy) is punishable, although the conspiracy or confederacy be not executed," it is clear that the *nota* at the end of the case of *The Poulterers*, which it has been frequently claimed states the rule, that both malice and falsehood are indispensable ingredients of a punishable conspiracy, and must be united in the same case, was not intended by *Lord Coke* as applicable to all

confederacies, but to such conspiracies only as are of the character of those of which he had treated immediately preceding the *nota*; for he does not speak of the case of a conspiracy between merchants to fix the price of wool as a false conspiracy, nor does either falsehood or malice necessarily enter into such a combination. And these combinations among merchants (which are not within the Statute 33 Edward I.) were, and remain punishable at common law, and were not first made so by the Statute Staple, 27 Edward III., chap. 9. That statute does indeed prohibit the exportation of wool under a very severe penalty, but neither creates, nor provides a punishment for the offense by merchants of combining to fix a price beyond which they would not go. All that is said in relation to the purchasing of wool is, that "all merchants, as well subjects as foreigners, may purchase wool-folk, etc., throughout the whole of our kingdom and territory without covin or collusion to lower the price of the said merchandizes, so nevertheless as they bring them to the staple," from which it would seem that all covin and collusion to lower the price of merchandize was before unlawful, and that the statute intended to leave the law as it was.

The Act of 7 and 8 Vict. chap. 24, repealing the statutes relating to forestalling, engrossing and regrating, and abolishing them also as common law offenses, seems to recognize the existence of the common law crime of "knowingly and fraudulently spreading or conspiring to spread any false rumor with intent to enhance or destroy the price of any goods, wares or merchandise being brought to any fair or market," and it excepts such offense from the force of the repealing Act.

In *The Poulterers Case* it was plainly considered an offense at common law; and in 4 Bl. Com. 154, the exportation of wool, which, as before stated, was prohibited by the statute staple, under a very heavy penalty, is said to have been forbidden at common law, but more particularly by that statute; and if that which it was the principal object of the statute to prevent and to punish, was before an offense at common law, it may readily be supposed that no new offense was intended to be created; but that a conspiracy to fix the price of wool was an offense at common law. Moreover the words of the statute are "without covin

or collusion to lower the price," etc., and a combination to "fix a price, beyond which they would not go," does not necessarily include the offense "to lower" the price. *Breerton v. Townsend*, Noy's Rep. 103, states an information against Breerton, Townsend, and others, for the suppression of a will under a confederation, although the act by one was not indictable. The injury in that case was to the relator, whose wife was thereby disinherited. In *Timberley and Childe (or Kimberty) 1663*, 1 Siderfin, 68, the indictment was held good, for a conspiracy to charge one with being the father of a bastard child, with intent to extort money from him.

So in *King v. Tymbirly*, 1 Keble, 254, a judgment was rested upon two distinct grounds; that it is a conspiracy for lucre and gain to charge and disgrace a man with having a bastard; and that the crime is the conspiracy, which whether it is to defame or disgrace a man, or charge him with heresy, is punishable at common law. So in 1663, a conspiracy was held punishable although the court had no cognizance of the matter of it, where it might be of loss to the prosecutor.¹

Rex v. Armstrong, 1 Vent. 304, was a conspiracy to extort money from an individual, by going to him, and affirming that he was the father of a bastard child, with a view of inducing him to pay them to say no more about it. And it was decided on the ground expressly taken by the court, that it was a contrivance by conspiracy, to defame the person and cheat him of his money, which was an indictable crime of a very heinous nature. In 1705 in *Reg. v. Best*, 2 Ld. Raym. 1167, the principle was laid down that the defendants being charged at least with a conspiracy to charge the prosecutor with fornication, though that was only a spiritual defamation, yet the conspiracy was the gist of the indictment, and was a temporal offense and punishable as such.

In 1719 in *Rex v. Kinnersley*, 1 Strange, 193, the object was by a conspiracy to extort money by means of a verbal slander, not a crime if committed by one only. And in 1730, in *Rex v. Bryan*, 2 Strange, 866, the court in speaking with reference to *Rex v. Armstrong*, in 1678, 1 Vent. 304, says, "there the conspiracy was the crime; and an indictment will lie for that, though

¹*Child v. North*, 1 Keble, 203; see *State v. Stewart*, 59 Vt. 273.

it be to do a lawful act." In that class of conspiracies, the meditated end was not accomplished in either of the early cases. The object in each was to defame, and extort money from an individual; and the indirect or wrongful means by which that object was intended to be effected was verbal slander—not a prosecution, but the charge is laid as having been made *in pais*; in one instance the charge being made to the prosecutor himself—a combination to do that, which if actually done by one alone, would not be the subject of an indictment. The conspiracy therefor for a corrupt purpose was the offense for which they were punished.

In *Rex v. Rispal* (1762) 1 W. Bl. 368, Lord Mansfield held a combination criminal, organized to extort money by charging a man "with criminal acts, or such as only may affect his reputation." The crime consisted in the purpose to charge the man publicly, although not in a court.¹ A combination to charge privately would be a conspiracy to extort or cheat.²

If the purpose be not to extort, the charge must be false or without reasonable ground.³

In 1763, in *Rex v. Parsons*, 1 W. Bl. 392, the conspiracy was to injure the prosecutor's reputation by pretended revelations of a spirit charging him with a murder, and in 1762, in *Rex v. Rispal*, 1 W. Bl. 368, Lord Mansfield said "the crime laid, is an unlawful conspiracy; this, whether it be to charge a man with criminal acts, or such only as may affect his reputation, is fully sufficient." In others words, a conspiracy to defraud another by verbal scandal, is equally indictable, whether it be to charge the party with a crime, or only to injure his standing in society.⁴

In *Roy v. Skirret*, 1 Siderfin, 312, the form of indictment does not appear, but it was against persons conjointly, and therefore either in conspiracy or combination. The charge was the false reading of a release to an ignorant man to procure

¹Hollingberry, K. B. 1825; Jacobs, 1845, in Recorder's Court, London (C. P. 1848); *Reg. v. Hamilton*, 1 Car. & K. 212, 1862; *Reg. v. Menage*, 3 Fost. & F. 310, 1866; *Reg. v. Cracknell*, 10 Cox, C. C. 408, 1868; *Reg. v. Richards*, 11 Cox, C. C. 43; *Com. v. Tibbets*, 2 Mass. 536; *Johnson v. State*, 26 N. J. L. 813.

²Cp. Yates, 1853; see *Com. v. Wood*, 7 Rep. 58.

³1629, Tailor's Godb. 444, Lord Holt, 1705; *Reg. v. Best*, 2 Ld. Raym. 1167, 1823; Murray, 1 Burn's J., 3d ed. 976.

⁴*Johnson v. State*, 26 N. J. L. 813; *Riding v. Smith*, L. R. 1 Ex. Div. 91.

his signature. If the fraud upon the individual had been practiced by one person, it would not have been an indictable cheat. It was the combination which alone made it criminal, and the prosecution was sustained although it was not within the Statute 33 Edward I. In 1705, in *Reg. v. MacKarty*, 2 Ld. Raym. 1179, 6 Mod. 301, 1 Salk. 286, the defendants were conjointly indicted for falsely and deceitfully bargaining and exchanging with another a quantity of pretended wine for goods, upon the faith of their false statement made in pursuance of the combination. The crime of conspiracy was not named, but the combination was charged with the act, and as no false public tokens were used, which was necessary at common law to constitute a cheat effected by one, and the Statute, 30 Geo. II., chap. 24, against "false pretences" was not then passed, it was the combination alone on which the prosecution could have been sustained. A cheat by false public tokens, such as false weights and measures, is indictable, because ordinary care and prudence cannot safeguard one against their use, and for the same reason cheats effected by conspiracy are punishable. Indeed, in 1761, *Res v. Wheatly*, 2 Burr. 1127, 1 W. Bl. 273, cheats effected by conspiracy are expressly placed upon the same footing with cheats effected by false weight and measures.

In 1704, in *Reg. v. Orbell*, 6 Mod. 42, the indictment was for a conspiracy to cheat one J. S. of his money by inducing him to bet upon a foot-race and by bribery controlling the result. The act of an individual was not indictable, and the combination constituted its criminality.

In *Res v. Edwards*, 1 Strange, 707, 8 Mod. 320, 1 Sess. Cas. 836, the parties were indicted for giving money to a man who was settled in the parish of A to induce him to marry a poor and helpless woman of the parish of B and make her a charge on his own parish. It was objected that it was not unlawful to marry a woman and give her a portion, but the object of the conspiracy being to impose a pauper on a parish to which she did not belong, it was held to be an indictable offense at common law; for that a bare conspiracy to do a lawful act to an unlawful end was a crime though no act should be done in consequence thereof. The fraud was attempted upon the inhabitants of the parish, and as they are

not the public at large, the offense was directed against individuals, though Chitty, in his 3d volume on criminal law, treats it as a conspiracy to violate public policy, the principle applies equally to both.

In *Fowler's Case*, 1788, 1 East, 461, 462, the combination was to charge a parish, by bribing a poor man, who had got a poor woman of another parish with child, to marry the woman, and Buller, *J.*, held that "some violence, threats or contrivance," or "some sinister means," must be shown with some forcing of marriage against the will of the parties. So in *Parkhouse's Case*, 1792, 1 East, P. C. 462.

In *Rex v. Seward*, 1834, 1 Ad. & El. 706, it was said if a marriage was induced by unfair and undue means it might be unlawful; the parties being unwilling and the means unlawful.

In 1719 in *Rex v. Cope*, 1 Strange, 144, the conspiracy charged was to ruin the trade of the prosecutor, who was a card maker, by bribing his apprentices to put grease into the paste and destroy the appearance of the cards. The act if done by one would not have constituted a crime in law, and the conspiracy was the gist of the offense, unless, indeed, the act of the apprentice was made a crime in him as an apprentice.¹

In *Rex v. Eccles*, 1783, 1 Leach, C. C. 274, the indictment was for a conspiracy by wrongful and indirect means to impoverish a tailor and to hinder him from following his trade. The meditated injury was leveled at a private individual, unconnected with any matter of public concernment and not within the principle of any of the enumerated offenses against public trade, which are offenses committed by traders or dealers themselves, such as cheating, forestalling, regrating, etc.

Several master tailors were indicted for combining to impoverish and prevent a rival master tailor from trading. The proposed means not being set out, a question was raised as to the sufficiency of the indictment. It was sustained, *Lord Mansfield* saying: "The illegal combination was the *gist* of the offense. Persons in possession of any articles of trade may sell them at such prices as they individually please, but if they confederate and agree not to sell them under certain prices it is a conspiracy; so every man

¹See 1727 *Edmonds*, 1 Sess. Cas. 288, p. 357; and *Powell and Gould, JJ.*, 1704, *Daniell and C.* p. 1848, *Burton*; and 5 *Eliz.* chap. 4, § 85.

may work at what price he pleases, but a combination not to work under certain prices is a indictable offense."

It was held that it was not necessary to state the means by which the intended mischief was effected, for that the offense did not consist in doing the acts by which the end was accomplished (for they might be perfectly indifferent) but in conspiring with a view to effect the intended mischief by any means; *Justice Bul-ler* saying that "the means were only matter of evidence to prove the charge, and not the crime itself."

The ruling in this case as to the illegal purpose to impoverish does not at all conflict with the decision in *Le Roy v. Starling*, 1 Sid. 174; *Attorney v. Starling*, 1 Keb. 650; *Rea v. Starling*, 1 Keb. 655, where the information was against the brewers of London for conspiring to put down the gallon trade by which the poor were supplied, and to cause the poor to mutiny against the farmers of excise, and to depauperate the farmers of the excise. The only objection taken was that "it is no crime by our law to depauperate another in order to enrich oneself, as by underselling." It may be no crime to undersell goods to enrich oneself, even if it result in pauperizing another, and yet a crime to combine to undersell for the purpose of impoverishing a rival.

In *Stratton's Case*, 1809, where the indictment was for a combination for false and malicious prosecution, the indictment alleged an intent to deprive the prosecutor of his office.

In *Kenrick's Case*, 1843, *Lord Denman* said that if, in *Rea v. Turner*, 13 East, 228, the meditated injury, instead of ending with the trespass in pursuit of hares, had been planned for the purpose of seizing the landlord or driving him out of the country, it would have been sufficient.

In *Rowland's Case*, 1851, in response to a question whether a combination to entice away workmen was indictable, *Lord Campbell* said: "Would it not be indictable if it were done for the purpose of ruining a tradesman?" and *Erle, J.*, said that it was lawful for persons to combine for their own benefit, "but I consider the law to be clear so far only as while the purpose of the combination is to obtain a benefit for the parties who combine, a benefit which by law they can claim. I make that remark, because a combination for the purpose of injuring another is a

combination of a different nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves, gives no sanction to combinations which have for their immediate purpose the hurt of another."

In *Duffield's Case*, 5 Cox, C. C. 404, 429, Erle, *J.*, said, regarding *Turner's Case*, "A conspiracy to injure a man in his private property; a conspiracy to prevent all customers coming to his shop—what is it but a civil injury? A conspiracy to injure—two men combining to interfere with a man's civil right—is indictable."

Nor does it matter if the primary purpose of the acts and means is not the obstruction and injury of the business of another; yet if in the accomplishment of the primary purpose, the intent is to make such obstruction or harm an incident of such primary purpose, if necessary to accomplish it, then the malice follows and is established by it.¹

Where the action was for maliciously inducing a singer to break her contract, Compton, *J.*, said that where two or more parties with a malicious intent to injure a rival trader, go to a banker or other party who owes money to his rival, and begs him not to pay the money, and by that means ruins or greatly prejudices the party, an indictment or writ of conspiracy at common law might be maintained, and in a civil action damages beyond the sum withheld if the injury were greater.²

In Wentworth's *Precedents*, vol. 4, p. 105, there is an indictment, 1788-89, for combination to impoverish R. Meux and to ruin him in his trade of a common brewer by persuading his customers to leave him.

In *Van Horn v. Van Horn*, 10 L. R. A. 184, 52 N. J. L. 284, the defendants, Amos H. Van Horn and Casper Soer, Jr., were summoned to answer James Van Horn, and Emma D. Van Horn, his wife, in tort, for a conspiracy or combination to break up the wife's separate business of selling fancy goods on consignment at Newark. Two firms of wholesale jobbers in fancy and millinery goods had agreed, verbally, to supply her on credit with a stock of such goods to be sold by her on commission, limiting the total

¹*People v. Petheram*, 7 West. Rep. 592, 64 Mich. 252.

²*Lumley v. Gye*, 1858, 22 L. J. Q. B. N. S. 471.

amount to \$2,500. One of said firms had, in pursuance of the agreement with her, sent \$500 worth of goods, which were received and placed in her store for sale, and she was daily expecting the balance. With this prefatory statement, the declaration charges that the defendants, maliciously intending to injure and drive the said Emma D. Van Horn out of business, and into public scandal, shame and disgrace, and to injure her in her credit and business, and to prevent her from acquiring any profit or gain therefrom, or from continuing the same, did maliciously conspire, combine and agree to prevent her from enjoying and continuing her business, and in pursuance of said conspiracy, etc., did entice into their store in Newark one of the plaintiff's employes, and by artful persuasion and threats induced her to tell where the plaintiff's stock of goods was purchased, telling her the stock would be taken from her, and the business closed up; and, in pursuance and in further performance of their unlawful intent and combination, endeavored to prevent the customers and friends of the plaintiff from dealings with her, by falsely and fraudulently representing to them that she would not be able to carry on her business, but would have to close up, as she was selling goods that did not belong to her, and living off the proceeds, instead of accounting therefor, and by sending threatening notes and messages to them designed to intimidate them from having any dealings with her, and did threaten to pursue her until she was ruined. That in further pursuance of such combination, and by means of fraud and deceit, they did persuade the said firm in New York to decline to complete their contract, and did prevail on them, by means of corrupt, fraudulent and deceitful representations and statements as to the personal and business character and standing of the plaintiff, to remove the stock already supplied her, and refuse to deliver her other goods as agreed for, leaving her entirely without any stock to sell, or customers to purchase from her, by means whereof she was left without stock and credit with the said firms, and could not obtain goods from other parties, and was driven out of her business and occupation, and deprived of the profit and livelihood which she was making and daily increasing. To this declaration a general demurrer was filed, and joinder added.

The declaration is in effect an action on the case setting forth a

malicious conspiracy, or confederation, with the means employed to effect its purpose, and the resulting damages to the plaintiff. It was held that no further specification is required than the general terms in which it is pleaded in the declaration.

Nor is there presented for determination in this pleading the vexed question whether an action will lie against a third person for the malicious procurement of the breach of a contract, if by such procurement damage was intended to result and did result to the plaintiff.¹

In the opinion of Mr. Pollock, *Torts*, 267, the difficulties in such cases disappear, or are greatly reduced, when the cause of action is considered as belonging to the class in which malice, in the sense of actual ill will, is a necessary element. Here the whole pleading is based on the malicious conduct of the defendants in destroying the plaintiff's credit and patronage, and breaking up her business and means of livelihood. Here no breach of contract is alleged. There was no binding contract between the New York firms and the plaintiff upon which they could be sued for a breach. Where there is a suable contract between a contractor and contractee there is difficulty, in principle, in showing privity in another, or to make the person who procures a breach of the contract the proximate cause of injury. The party who breaks the contract, for whatever cause, whether by procurement of others or of his own volition, is primarily responsible to the other party; and the procurer, it would seem, can only be held responsible for the breach, where there is malice shown to the sufferer, giving a distinct cause of action for the malice which caused the breach of the contract resulting in damages to him. The plaintiff Emma D. Van Horn, it is alleged, was selling goods on consignment from others, with the expectation of greater consignments in the future. If the consignors refuse to send the goods to her it does not appear that she could have any remedy against them. They could send or recall them at pleasure.

The complaint here is that the goods in the plaintiff's possession were recalled, and her advantageous arrangement for credit with the consignors ended, by the fraudulent and malicious act of the defendants. If she has no remedy against the defendants, it is

¹*Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, L. R. 6 Q. B. Div. 383.

said, she can have none against others for the wrong which she claims she has suffered.

The difference between this action and slander is well stated in *Riding v. Smith*, L. R. 1 Exch. Div. 91, where a slander against the wife was charged as having injured the husband's business. Her name was stricken from the record as a joint plaintiff, and the action was allowed to proceed by the husband, as a trader carrying on business, founded on an act done by the defendant which led to the loss of trade and custom by the plaintiff. It was maintainable on the ground that the injury to the plaintiff's business was the natural consequence of the words spoken, which would prevent persons resorting to the plaintiff's shop. Upon the whole case presented in the declaration *Mogul Steamship Co. v. Mc Gregor*, L. R. 21 Q. B. Div. 544, L. R. 23 Q. B. Div. 593, is important to aid in preserving the distinction between injuries caused by mere rivalries in business, without the intention of ruining the trade of the plaintiff, and those where such intent is shown with personal malice towards him. In the first report, *Lord Chief Justice Coleridge* says: "It is too late to dispute, if I desired to do so, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this." In the later report *Lord Justice Fry*, after a full statement of cases, says that no mere competition carried on for the purpose of gain, and without actual malice, is actionable, even though intended to drive the rival in trade away from his place of business, and though that intention be actually carried into effect. *Lord Esher, M. R.*, dissented. It was decided that the exclusion of the plaintiffs, rival freighters, from participation in a 5 per cent rebate on freight on teas from China, not being through malice, but in competition to increase their own business, was not actionable. The basis of action seems, in *Van Horn v. Van Horn*, 10 L. R. A. 184, 52 N. J. L. 284, it is said by the court, to be, as stated in the declaration, the fraudulent and malicious acts of the defendants in driving the plaintiff Emma D. Van Horn out of her business; the statements of the means used to effect this purpose all combine to produce a single cause of action, and were held to be sufficiently stated on demurrer.

A combination between several dealers in merchandise to refuse

to sell to a particular merchant is not an actionable conspiracy; but inducing others to refuse to sell to him, in order to injure his business and for an object not intended to serve any legitimate purpose of their own, is actionable. ¹

Maliciously conspiring together with intent to injure and destroy the character of another, and falsely suing out an inquisition of lunacy against her, for the purpose of driving her from her dwelling-place, thus injuring her profession and business and bringing her into public scandal and disgrace, is conspiracy for which a prosecution will lie.²

In *Rex v. Leigh*, 1775, 2 Macklin's Life, 217, in *Macklin's Case*, 1 Car. & K. 28, note, & 2 Campb. 372, note, 6 Went. Pl. 443, it was held, that an indictment would lie for a conspiracy to impoverish an actor, by driving or hissing him off the stage. And in *Clifford v. Brandon*, 1809, 2 Campb. 358, it was said by Sir James Mansfield, that "though the audience had a right to express by applause or hisses their sensations at the moment, yet if a body of men were to go to the theatre with a settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment."

In *Rex v. Robinson*, 1 Leach, C. C. 37, it was distinctly admitted that a conspiracy to do an injury to the person or estate of another was an indictable offense, and that it was not required to prove any direct or immediate injury, or even to show any specific overt act of conspiracy, but that it was the province of the jury to collect from all the circumstances of the case, whether there was not an intention or design in the parties in contracting a marriage in the assumed name of Richard Holland to raise a spurious title in the wife, to the estate of Richard Holland, and thereby do a future injury to Holland. The marriage in an assumed name, both parties consenting thereto, was not in itself unlawful, but the object was to defraud an individual, and the conspiracy was leveled at the property or estate of another.

In *Chetwynd v. Lindon*, 1752, 2 Ves. Sr. 450, Lord Hardwick

¹*Dele v. Winfree*, — Tex. —, March 24, 1891.

²*Smith v. Nippert*, 76 Wis. 86.

thought a combination to set up a supposititious child as a legitimate one, so as to impede the course of descent in law, and defeat the heir at law, might be indictable.

In *Rex v. Lara*, 6 T. R. 565, it was admitted by counsel in argument that a fraud upon an individual by conspiracy was indictable, and the doctrine laid down by the judges in *Rex v.*

Wheatly, 2 Burr. 1127, 1 W. Bl. 273, was fully recognized and adopted by Lord Kenyon; that is, that a cheat effected by a conspiracy is an indictable offense.

In *Rex v. De Berenger*, 3 Maule & S. 68, the indictment was for a conspiracy by false rumors to raise the price of the public government funds, with intent to injure such of the king's subjects as should purchase on a particular day. It was contended that this charge was too general as to the persons intended to be harmed, but the objection was overruled, not on the ground that to constitute an indictable conspiracy, it should be leveled either at the public aggregated, or at a class or distinct portion, as distinguished from an individual, and that the case fell within one of these classes of conspiracies; for it was treated throughout as perfectly clear, that if it had been laid with intent to prejudice or defraud either the public or an individual or individuals by name it would have been good, and the only difficulty on that part of the case was, whether, being laid with intent to injure those who might become purchasers, and not either an individual by name or the public in its aggregate capacity, the generality of the charge did not vitiate the indictment. But the indictment was sustained *ex necessitate rei*, on the ground that as it was impossible the defendants could have known who would be the purchasers on that day, the charge could not have been more specific. And though it was conceded that to raise or lower the price of the public funds, was not *per se* a crime, yet it was held to be an offense for a number of persons to conspire to raise them by false rumors; and that the crime was not in raising the funds, but in the act of conspiracy and combination to do so, and would be complete though it should not be pursued to its consequences. It was upon the point of individual injury that the judgment rests.

In the same manner, it is there said, it is indictable if a false rumor is spread on a day prior to a market day, in order to raise

the price of a commodity in the market, whether it be an article of necessity or not.

Combinations or contracts, having for their purpose the giving of a fictitious value to any commodity above its value in the open market are void.¹

No agreement for defrauding the public can be valid.²

Combinations whose objects are to create what are known as corners in the market, or to control the traffic in any staple which is a popular necessity, or to enhance the price thereof, or to withhold the same from the market, or to prevent competition in the sale thereof, are void.³

A "corner" when accomplished by confederation, to raise or depress prices and operate on the market, is a conspiracy, if the means be unlawful.⁴

So sales to create fictitious value of stocks to induce advances by broker on stock.⁵

And so as to conspiracy to monopolize, by fraudulent means, any particular business staple, so as to force a sale at exorbitant prices, such as coal,⁶ or oil.⁷

Any agreement between large operators, in any article, to combine to thus rule the market and obtain exorbitant prices, is an unlawful conspiracy against trade, and void.⁸

¹*Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 346; *Raymond v. Leavitt*, 46 Mich. 447; *Fairbank v. Leary*, 40 Wis. 687; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Fisher v. Bush*, 35 Hun, 645; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 174; *McNamara v. Gargett*, 12 West. Rep. 650, 68 Mich. 454; *Davis v. Seoley*, 71 Mich. 209; *Sampson v. Shaw*, 101 Mass. 145; *Wright v. Cradde*, 78 Ind. 487.

²*People v. Stephens*, 71 N. Y. 527.

³*Greenhood*, Pub. Pol. 642; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 568; *Leonard v. Poole*, 4 L. R. A. 723, 114 N. Y. 371.

⁴*Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178; *People v. Melvin*, 2 Wheel. Crim. Cas. 262; *Samuels v. Oliver*, 130 Ill. 78.

⁵*Com. v. Philadelphia County Prison Supt.* 6 Phila. 169.

⁶*Rez v. Norris*, 2 Ld. Kenyon, 300; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173.

⁷*Com. v. Tack*, 1 Brewst. 511; *Huntsinger v. Com.* 10 W. N. C. 98; *Com. v. Haines*, 15 Phila. 363.

⁸*Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 346; *Fairbank v. Leary*, 40 Wis. 687; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 672. And see *Collins v. Locke*, L. R. 4 App. Cas. 674; *Western U. Teleg. Co. v. Chicago & P. R. Co.* 86 Ill. 246; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 72 Ill. 360.

A contract entered into by the grain dealers of a particular locality, the real purpose of which is to establish in active force a secret combination which would stifle all competition, control the price of grain, cost of storage and of shipment, is in restraint of trade and void as against public policy.¹

Where one producer or holder of an article of public use enters into a contract with another producer or holder, binding the latter to hold and keep out of the market his supply, the contract is against public policy and void.²

An agreement to form a pool for the purchase of a commodity in common use, involving the controlling and withdrawal from the market of large quantities, is an unlawful combination which would not be enforced between the parties.³

Upon the same principle in *Clary v. Com.* 4 Pa. 210, an indictment which charged a conspiracy which had for its purpose the circulation of certain false and forged bills, with the intent to cheat and defraud "the citizens of this commonwealth and others," was held good. So also in *Com. v. Judd*, 2 Mass. 329, a conspiracy to manufacture spurious indigo, and sell the same at public auction with intent to cheat and defraud such persons as should become purchasers, was held sufficient.⁴

The conviction in *Rex v. Gill*, 2 Barn. & Ald. 204, was for a conspiracy to cheat several individuals by name. The indictment was not under Statute 30 George II., for the particular false pretences were not stated showing them to be within the statute, as required,⁵ or under Statute 33 Henry VIII., against cheating by false privy tokens, etc.⁶

It was ruled that when several persons have once agreed to cheat a particular individual of his money, although they may not at the time have fixed upon any particular means for that purpose,

¹ *Craft v. McConoughy*, 79 Ill. 846.

² *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558.

³ *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Knowlton v. Congress & E. Spring Co.* 57 N. Y. 518; *Bell v. Leggett*, 7 N. Y. 176; *Keene v. Kent*, 4 N. Y. S. R. 481.

⁴ See also *People v. Arnold*, 46 Mich. 263; *Collins v. Com.* 3 Serg. & R. 220; *Reg. v. Peck*, 9 Ad. & El. 686; *McKee v. State*, 9 West. Rep. 888, 111 Ind. 378.

⁵ *Rex v. Mason*, 2 T. R. 586; East, Crim. Law, 837.

⁶ 3 Chitty, Cr. Law, 999; *Rex v. Munz*, 2 Str. 1127.

the offense of conspiracy is complete, and that it was sufficient to state the act of conspiring and the object of the conspiracy in the indictment, without setting out the means by which it was intended to be accomplished; which, as *Lord Mansfield* said, in *Rex v. Eccles*, 1 Leach, C. C. 274, "may be perfectly indifferent." The indictment was not sustained on the ground that it was a conspiracy to commit an indictable offense; for if it had not been for a conspiracy to cheat, but against an individual for the actual commission of the offense it would have been bad for the generality of the allegation. *Rex v. Maubry*, 6 T. R. 619, for a conspiracy to prevent the course of justice, shows that all indictable offenses are not embraced by the Statute 33 Edward I., but that at common law a conspiracy to do anything which the law forbids is indictable.

In *Rex v. Delaval*, 3 Burr. 1434, the conspiracy was to place a girl by her own consent, in the hands of Delaval, for the purpose of prostitution. The act of seduction was not in itself an indictable offense, but it was the end, the immoral purpose of the conspiracy which gave it a criminal character. The law holds as criminal all conspiracies against public virtue and good morals, although the act by an individual would not be thus punishable. The influence of many, united to overcome the virtue of a woman, is recognized as more dangerous than the seductive arts of one. So a conspiracy to induce a young female, by false pretenses, to have illicit connection with a man.¹

And in a recent case in Illinois, although seduction was not made criminal by statute, the conspiracy to accomplish it was held to be so at common law, and it was held unnecessary to show that the means used were either unlawful or criminal.²

So a conspiracy to induce a girl of 17, not shown to be chaste, to become a common prostitute, was held indictable. *Reg. v. Howell*, 1864, 4 Fost. & F. 160, Bramwell, B., ruling that any unlawfulness in the state of things to be accomplished by the conspiracy was sufficient to give it a criminal character, and since agreements for prostitution or claims for goods supplied for purposes of prostitution are illegal in the sense that they cannot be enforced,

¹ *Reg. v. Mears*, 1851, 2 Den. C. C. 79; *State v. Savoy*, 48 Iowa, 562.

² *Smith v. People*, 25 Ill. 17. See *Anderson v. Com.* 5 Rand. 627.

prostitution itself is a sufficiently illegal state of things to render indictable a combination to bring it about.

So a conspiracy to accomplish the abduction of a minor and to procure adultery, was indictable.¹

So for the procurement of a fraudulent marriage ceremony.²
Or to aid female infant to escape parental control to marry her.³

So it is criminal to conspire to do any act offensive to public decency, as preventing burial of body of pauper and removing it from workhouse for any improper or indecent purpose.⁴

In 1 Hawk, P. C. 190, chap. 72, it is said, "there can be no doubt that all combinations whatsoever, wrongfully to prejudice a third person are highly criminal at common law."⁵

Chitty says: "In a word, all confederacies wrongfully to prejudice another are misdemeanors at common law, whether the intention is to injure his person, his property, or his character."⁶

And 4 Bl. Com. 157 (Christian's ed., *note 4*) "every confederacy to injure individuals, or to do acts which are unlawful, or prejudicial to the community, is a conspiracy.

In 1 Tremain's P. C. 82, 83, there is a precedent of information against Turner and others, for a conspiracy to destroy the reputation of one George Green, and falsely to charge him with adultery with the wife of one of the conspirators, for the purpose of extorting money from him. In 1 Tremaine P. C. 86, against Record and others for a cheat practiced on Lady Dorothea Seymour in prevailing on her by means of a falsehood to advance large sums of money to them. In the same book, p. 91, against Wilcox and others for cheating by conspiracy one John Dulton of a quantity of cloth, under pretense of buying them. In page 94 against Taydler and others for a cheat by conspiracy in drawing an absolute conveyance to themselves of the estates of two women, and persuading him to execute it, pretending it was only in trust for the women. In Tremaine, P. C. 97, against Alibone

¹ 1683, *Rez v. Grey* (Lord), 2 How. St. Tr. 519 (9 How. St. Tr. 127).

² *State v. Murphy*, 6 Ala. 765; *Respublica v. Hevica*, 2 Yeates, 114.

³ *Rez v. Thorp*, 5 Mod. 231; *Reg. v. Blacket*, 7 Mod. 39; *Rez v. Sergeant*, Ryan & M. N. P. 853; *Miffin v. Com.* 5 Watts & S. 461.

⁴ *Young's Case*, 1780, cited in 1788, *King v. Lynn*, 2 T. R. 733.

⁵ 8 Wilson's Works, 118; 1 Burn's Jus. 378.

⁶ 3 Chit. Crim. Law 1189.

and others for cheating by conspiracy one Hillard in obtaining divers bonds from him for the payment of money to themselves and others, as a consideration for procuring a marriage between him and an indigent woman, whom they represented as being rich.

In neither of these could an indictment have been sustained for the same injury practiced by an individual, without the charge of conspiracy or combination, and as Tremaine gives the term, the reigns and the names of the respective parties, there can be little doubt that they are precedents of informations in adjudicated cases, and that they were held to be good, and they go far to show how the common law was understood in England in the reigns of Charles and James II. And the law of conspiracy as settled by the uniform tenor of the decisions of the courts in England has, except as to combinations of workmen, been recognized and adopted as the common law generally in this country.

Under that law any combination to prejudice another unlawfully has been considered as constituting the offense of conspiracy. It is enough if the acts agreed to be done, although not criminal, are wrongful; that is, amount to a civil wrong.¹ The offense has been held to consist in the conspiracy, and not in the acts committed for carrying it into effect; and the charge has been held sufficient when made in general terms describing an unlawful conspiracy to effect a bad purpose.²

§ 65. **Conspiracy Defined.**—It would be exceedingly difficult and dangerous to attempt an exclusive definition of an offense, so ramified in its nature and character, and which derives its crimin-

¹*Reg. v. Warburton*, L. R. 1 C. C. 274.

²*Reg. v. Kenrick*, 5 Q. B. 49, Denman, *Ch. J.*; *Reg. v. Selby*, 5 Cox, C. C. 495, note, Rolfe, *B.*; *Reg. v. Harris*, 1 Car. & M. 661, Tindal, *Ch. J.*; *Hilton v. Eckersley*, 6 El. & Bl. 47, Compton, *J.*; *Rez v. Mawbery*, 6 T. R. 619, Grove, *J.*; *Rez v. Eccles*, 1 Leach, C. C. 274, Lord Mansfield; *Walsby v. Anley*, 3 El. & El. 516, Hill, *J.*; *Reg. v. Rowlands*, 17 Q. B. 670, Campbell, *Ch. J.*; *Reg. v. Druitt*, 10 Cox, C. C. 592, Bramwell, *J.*; *Reg. v. Bunn*, 12 Cox, C. C. 316, Brett, *J.*; *Springhead S. Co. v. Riley*, L. R. 6 Eq. 551, Malins, *J.*; *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476, Coleridge, *Ch. J.*; *Com. v. Hunt*, 4 Met. 111, 128, Shaw, *Ch. J.*; *Smith v. People*, 25 Ill. 17, Calm, *J.*; *Com. v. Carlisle*, Journal Jurisp. 225, Gibson, *Ch. J.*; *Carew v. Rutherford*, 106 Mass. 1, Chapman, *Ch. J.*; *Rez v. Ferguson*, 2 Stark, N. P. 489; *Rez v. Bykerdike*, 1 M. & Rob. 179; *People v. Fisher*, 14 Wend. 9; *State v. Donaldson*, 33 N. J. L. 151; *Snow v. Wheeler*, 113 Mass. 186; *State v. Stewart*, 59 Vt. 278; *State v. Noyes*, 25 Vt. 415; *State v. Burnham*, 15 N. H. 396; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178.

ality from its object and tendency; but in general terms a criminal conspiracy may be defined, as a combination to work out in concert or by concerted means, any criminal end or certain unlawful purposes, or to accomplish under such combination, any purpose, by criminal or unlawful means. The word "unlawful" is used to indicate that there are certain acts, possessing such inherent qualities, that a union among many persons to accomplish them, or use them as means to any end, will necessarily produce such evil results, that to prevent such combinations, the law holds those uniting guilty of criminal conspiracy, although the doing of any of the acts by an individual would not be punished as a crime. The influence of an act upon society determines whether it is criminal conspiracy to combine to accomplish it, and not whether the act itself is criminally punishable.

I believe every well considered case which attempts a general definition, will support this statement. Of course, when the question is as to what particular acts possess these attributes, some difference will be found among the authorities, for it may depend upon the local law to determine whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it be unlawful or criminal.¹

The course of decisions running through a space of over four hundred years from the reign of Edward III. to the 59 of George III., without a single conflicting adjudication, and the decided weight of subsequent authorities in England and America has seemed to settle certain questions at common law. Thus, a con-

¹ *Com. v. Judd*, 2 Mass. 339; *State v. Cardozo*, 11 S. C. 195; *Com. v. Hunt*, 4 Met. 111; *State v. Hewett*, 81 Me. 396; *State v. Ripley*, 81 Me. 386; *State v. Mayberry*, 48 Me. 218; *State v. Burnham*, 15 N. H. 396; *State v. Rowley*, 12 Conn. 112; *Owens v. State*, 16 Lea, 1; *United States v. Johnson*, 26 Fed. Rep. 682; *United States v. Wooten*, 29 Fed. Rep. 707; *Spies v. People*, 10 West. Rep. 701, 122 Ill. 1; *Smith v. People*, 25 Ill. 24; *Com. v. Tibbets*, 2 Mass. 538; *Com. v. Warren*, 6 Mass. 74; *People v. Mather*, 4 Wend. 259; *State v. Cawood*, 2 Stew. (Ala.) 360; *State v. Rickey*, 9 N. J. L. 364; *State v. Buchanan*, 5 Harr. & J. 817; *Collins v. Com.* 8 Serg. & R. 220; *Morgan v. Bliss*, 2 Mass. 112; *People v. Richards*, 1 Mich. 216; *Reg. v. Button*, 11 Q. B. 929; *Rex v. Gill*, 2 Barn. & Ald. 204; *Reg. v. Best*, 1 Salk. 174; *United States v. Miller*, 8 Hughes, 553; *United States v. Donau*, 11 Blatchf. 168; *State v. Adams*, 1 Houst. C. C. 361; *State v. Bradley*, 48 Conn. 549; *State v. Jones*, 18 Iowa, 269; *State v. Sterling*, 34 Iowa, 444; *Com. v. Davis*, 9 Mass. 415; *Com. v. Wallace*, 16 Gray, 238; *State v. Pulte*, 12 Minn. 164; *State v. Christianbury*, 44 N. C. 48; *Com. v. McKissom*, 8 Serg. & R. 420; *Com. v. Corties*, 8 Phila. 450; *Troitchell v. Com.* 9 Pa. 211; *People v. Saunders*, 25 Mich. 124; *State v. Potter*, 23 Iowa, 554.

spiracy to do any act that is criminal *per se*, whether a felony or misdemeanor, is an indictable offense at common law.¹

The thing contemplated, must be in its very nature specially adapted to injure some person or the public generally, by reason of the concert of the parties,² or it must be the subject of indictment if done by one person.³

Among others may be instanced acts necessarily collective, as unlawful assembly;⁴ and a fraudulent knock down at auction;⁵ also certain frauds or perversion of justice;⁶ and combined con-

¹*Reg. v. Vincent*, 9 Car. & P. 91; *Com. v. Crowninshield*, 10 Pick. 497; *People v. Mather*, 4 Wend. 265; *Com. v. Kingsbury*, 5 Mass. 106; *Com. v. O'Brien*, 12 Cush. 84; *State v. Allen*, 47 Conn. 121; *State v. Shields*, 45 Conn. 256; *State v. Grady*, 34 Conn. 118; *State v. Buchanan*, 5 Harr. & J. 817; *Hazen v. Com.* 23 Pa. 355; *Com. v. Kostenbauder* (Pa.) 3 Cent. Rep. 682; *Frank v. State*, 27 Ala. 37; *Solander v. People*, 2 Colo. 48; *Doghead Glory v. State*, 18 Ark. 236; *State v. Stewart*, 4 New Eng. Rep. 378, 59 Vt. 278; *People v. Woody*, 45 Cal. 289; *Brennan v. People*, 15 Ill. 511; *Com. v. Demain*, Brightly, 441; *State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 46; *United States v. Johnson*, 26 Fed. Rep. 682; *People v. Leith*, 52 Cal. 251; *Lamb v. People*, 96 Ill. 78; *State v. Sterling*, 34 Iowa, 443; *Alderman v. People*, 4 Mich. 414; *Archer v. State*, 4 West. Rep. 726, 106 Ind. 426; *Williams v. State*, 47 Ind. 568; *State v. Dean*, 35 N. C. 63; *Jones v. State*, 64 Ind. 475; *State v. McKinstry*, 50 Ind. 465; *State v. Nash*, 7 Iowa, 347; *Cummins v. Com.* 81 Ky. 465; *State v. Torn*, 18 N. C. 569; *Rufer v. State*, 25 Ohio St. 465; *State v. Wilson*, 30 Conn. 500; *State v. Dean*, 35 N. C. 63; *Walton v. State*, 88 Ind. 9; *State v. Murray*, 15 Me. 100; *Scudder v. State*, 62 Ind. 13; *Brown v. State*, 2 Tex. App. 115; *State v. Winner*, 17 Kan. 305; *Carrington v. People*, 6 Park. Crim. Rep. 336; *State v. George*, 29 N. C. 821; *State v. Ford*, 37 La. Ann. 443; *State v. Ridley*, 48 Iowa, 370; *Mason v. State*, 3 Tex. App. 192; *Lawson v. State*, 32 Ark. 220; *Müller v. Com.* 78 Ky. 15; *People v. Richards*, 67 Cal. 412; *Landringham v. State*, 49 Ind. 186; *Skute v. Heyward*, 2 Nott & McC. 812; *State v. McKinstry*, 50 Ind. 465; *State v. Trice*, 88 N. C. 628; *Smith v. State*, 93 Ind. 67; *State v. Chapin*, 17 Ark. 561; *Nevill v. State*, 60 Ind. 309; *People v. Pool*, 27 Cal. 572; *Lisle v. Com.* 82 Ky. 250; *Com. v. Blackburn*, 1 Duv. 4; *Clinton v. Estes*, 20 Ark. 216; *Reid v. State*, 20 Ga. 681.

Reg. v. Warburton, L. R. 1 C. C. 274.

²*Com. v. Judd*, 2 Mass. 329; *Heaps v. Dunham*, 95 Ill. 583; *Twitchell v. Com.* 9 Pa. 211; *Smith v. People*, 25 Ill. 17; *State v. Potter*, 28 Iowa, 556; *Com. v. Hunt*, 4 Met. 111; *State v. Burnham*, 15 N. H. 396; *State v. Mayberry*, 48 Me. 218; *State v. Bartlett*, 30 Me. 134; *State v. Hewett*, 31 Me. 398; *State v. Rowley*, 12 Conn. 101; *State v. Parker*, 43 N. H. 88; *Alderman v. People*, 4 Mich. 414; *Hinchman v. Richie*, Brightly, 143; *Com. v. Bliss*, 12 Phila. 580; *Com. v. Ridgway*, 2 Ashm. 247; *State v. Murphy*, 6 Ala. 765; *Miffin v. Com.* 5 Watts & S. 461; *United States v. Watson*, 17 Fed. Rep. 145; *Reg. v. Bunn*, 12 Cox; C. C. 316; *Reg. v. Vincent*, 9 Car. & P. 109.

³*Reg. v. Hunt*, 1820, 3 Barn. & Ald. 566.

⁴*Clifford v. Brandon*, 2 Campb. 358; *Anon.* 6 T. R. 626; *Levi v. Levi* (1833), 6 Car. & P. 239.

⁵*Reg. v. Kroehl*, 1818, 2 Stark. N. P. 343; *Reg. v. Steventon*, 1802, 2 East, 362.

duct by trades, employers or workmen regarding the price of goods or labor.¹

The English Criminal Law Commissioners stated this general principle as the foundation of the law of conspiracy, that the confederacy of several persons to effect any injurious object creates such a new and additional power to cause injury as requires criminal restraint; although none would be necessary were the same thing proposed or even attempted to be done by any person singly.²

Many acts are said to be unlawful which would not be the subject of criminal conspiracy. Other acts are unlawful because they are in violation of the criminal law or some penal statute. If the ends or the means are criminal in themselves or contrary to some penal statute, the conspiracy is clearly an offense.³

A conspiracy to commit a felony or misdemeanor or any criminal act is indictable.⁴ So it is indictable to conspire to charge one with a crime, although there be no intent to procure a prosecution.⁵ It is also indictable to form a conspiracy to cheat one by making one drunk and playing falsely at cards with him.⁶

As a general rule at common law all confederacies wrongfully to prejudice another are misdemeanors and indictable, whether the intention is to injure his property, his person, or his character.

It is the intent to cause injury that poisons the agreement.⁷

All of the parties to the conspiracy need not be able each to aid

¹*Reg. v. Bykerdyke*, 1882, 1 Mood. & Rob. 179. See *Reg. v. Druitt*, 10 Cox, C. C. 592, 16 L. T. N. S. 855, 859; *Reg. v. Hewitt*, 1851, 5 Cox, C. C. 162; *Reg. v. Norris*, 2 Ld. Ken. 300; *Reg. v. Muobey*, 6 T. R. 619, 686; *Reg. v. Eccles*, 1 Leach, C. C. 214; *People v. Fisher*, 14 Wend. 9; *Master Stevedores Assn. v. Walsh*, 2 Daly, 1.

²Seventh Report, p. 90.

³*State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 46.

⁴*People v. Mather*, 4 Wend. 265; *Com. v. Kingsbury*, 5 Mass. 106; *State v. Buchanan*, 5 Harr. & J. 817.

⁵*Com. v. Tibbells*, 2 Mass. 536; *People v. Jones*, 12 West. Rep. 77, 67 Mich. 544.

⁶*State v. Younger*, 12 N. C. 357.

⁷1 Hawk. P. C. chap. 72, § 2; *Dela v. Winfree*, — Tex. —, March 24, 1891.

⁸*Horseman v. Reg.* 16 U. C. Q. B. 543; *Reg. v. Kenrick*, 5 Q. B. 49; *Com. v. Ridgway*, 2 Ashm. 247; *Reg. v. Richardson*, 1 Mood. & Rob. 402; *March v. People*, 7 Barb. 391; *State v. Rickey*, 8 N. J. L. 60.

or to accomplish it. It is sufficient if one can do the act proposed to render all consenting and combining guilty.¹

A conspiracy to injure a man in his trade or profession is indictable.² All conspiracies to "excite disaffection" are indictable at common law.³ A conspiracy to stir up jealousies, hatred and ill will between different classes of citizens is unlawful;⁴ or to induce others to violate the laws.⁵

It is said that there are many cases in which the act itself would not be cognizable by law, if done by a single person, which becomes the subject of indictment when effected by several by a joint design.⁶ Thus each person at a public exhibition has a right to express his disapprobation of the performance, but if several previously agree to express condemnation they may be guilty of conspiracy.⁷

So it has been said, there are other cases in which, though the act may be morally criminal, it is not illegal except on the ground of conspiracy; the verbal slander of a private individual is not indictable at common law, but it is so where several unite in a scheme to blast his character.⁸

But where the act is lawful for an individual, it can be the subject of a conspiracy, when done in concert, only where there is a direct intention that injury shall result from it; thus if a number of persons should combine to establish a ferry, not from motives of public or private utility, but to ruin or injure the owner of a neighboring ferry, the wickedness of the motive would render the association criminal, although it would be otherwise if the com-

¹ *Reg. v. McMahon*, 26 U. C. Q. B. 195; *United States v. Bayer*, 4 Dill. 407; *Den v. Johnson*, 18 N. J. L. 87; *Boggus v. State*, 34 Ga. 275; *State v. Sprague*, 4 R. I. 257; *State v. Gooch*, 105 Mo. 392.

² *Rea v. Eccles*, 1 Leach, C. C. 274, 8 Dougl. 337, approved in 1885; *Mogul Steamship Co. v. McGregor*, L. R. 15 Q. B. Div. 476, 482. See also *Reg. v. Hewitt*, 5 Cox, C. C. 162; *Carew v. Rutherford*, 106 Mass. 10-15; *Walker v. Cronin*, 107 Mass. 584; *Master Stevedores Assn. v. Walsh*, 2 Daly, 12; *Rea v. Bykerdyke*, 1 Mood. & Rob. 179; *State v. Donaldson*, 32 N. J. L. 151; *Walsby v. Anley*, 3 L. T. N. S. 666.

³ *Reg. v. Vincent*, 9 Car. & P. 91; *Reg. v. Shellard*, 9 Car. & P. 277; *Rea v. Hunt*, 3 Barn. & Ald. 566; Russ. Cr. 681.

⁴ *O'Connell v. Reg.* 11 Clark & F. 155.

⁵ *Hazen v. Com.* 23 Pa. 355; *Com. v. Kostenbauder* (Pa.) 3 Cent. Rep. 632; *State v. Stewart*, 4 New Eng. Rep. 378, 59 Vt. 278.

⁶ *Rea v. Mawbey*, 6 T. R. 636.

⁷ *Clifford v. Brandon*, 2 Campb. 358.

⁸ *Rea v. Kimberty*, 1 Lev. 62; *Rea v. Armstrong*, 1 Vent. 304.

bination were to employ capital in fair business competition with others in the same calling for profit and not for oppression. So the combination is criminal where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence. Thus if the bakers of a town were to combine to hold up the article of bread; or a powerful corporation to control the article of sugar; or a necessary article in common use like matches, and by means of a scarcity thus produced extort an exorbitant price for it, although the injury to the public would be only collateral to the object of the association, it would be indictable.¹

So there must be an agreement of two or more persons to do the act, not a mere intention.² But consent will amount to such agreement.³

Conspiracies to accomplish purposes which may or may not be by law punishable as crimes, but which are unlawful as violations of the rights of individuals, and for which the civil law will afford a remedy to the injured party, and will at the same time and by the same process punish the offender for the wrong and outrage done to society, by giving exemplary damages beyond the damages actually proved, have in numerous instances been treated as common law offenses. Among these may be included conspiracy to accomplish a seduction;⁴ conspiracy to prosecute;⁵ conspiracy to procure an arrest;⁶ to injure the personal property of another;⁷ to injure one in his business.⁸

¹ *Com. v. Carlisle*, Brightly, 36; *People v. North River Sugar Ref. Co.* 2 L. R. A. 33, 23 Abb. N. C. 164, 5 L. R. A. 387, 54 Hun, 354; *Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632.

² *Reg. v. Peck*, 9 Ad. & El. 686; *Mulcahy v. Reg.* L. R. 3 Eng. & Ir. App. 306; *Reg. v. Parnell*, 14 Cox, C. C. 506; *Reg. v. Absolon*, 1 Fost. & F. 498; *United States v. Johnson*, 26 Fed. Rep. 682; *State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 46; *United States v. Nunnemacher*, 7 Biss. 111.

³ *State v. Anderson*, 92 N. C. 732; *United States v. Babcock* (Mo.), 3 Cent. L. J. 144; *United States v. Goldberg*, 7 Biss. 175.

⁴ *State v. Murphy*, 6 Ala. 765; *Smith v. People*, 25 Ill. 24; *Anderson v. Com.* 5 Rand. 629.

⁵ *State v. Walker*, 32 Me. 195; *Com. v. McLean*, 2 Pars. Eq. Cas. 367; *Bloomfield v. Blake*, 6 Car. & P. 75.

⁶ *Elkin v. People*, 28 N. Y. 177.

⁷ *Lovely v. State*, 30 Tex. 403; *State v. Flynn*, 28 Iowa, 26; *Beecher v. Webb*, 113 Ill. 436; *State v. Earwood*, 75 N. C. 210.

⁸ *Rez v. Eccles*, 1 Leach, C. C. 274; *Mogul Steamship Co. v. McGregor*, L. R.

So to commit an assault and battery.¹

To involve one in an inquisition of lunacy without reasonable evidence,² or place in an insane refuge.³

So also a conspiracy to slander;⁴ or to commit a trespass.⁵

But a mere agreement to do an act which of necessity involves the concurrent consent and co-operation of two persons, is not a conspiracy between such person, as adultery or fornication, or duelling, bigamy, etc.⁶ The agreement or consent or collusion may be inferred from the acts proved.⁷ It may be shown by circumstantial evidence.⁸ A consent after the conspiracy is in action is sufficient.⁹

It is a common law offense to conspire to do an immoral act, although the act is not, if done by an individual of his own motion, illegal, except in the sense that contracts resting upon the consideration of such an act cannot be enforced.¹⁰

§ 66. Conspiracy against Civil Government.—This includes of course all conspiracies against civil governments, which are made crimes by statute or are such at common law, as treason.¹¹

15 Q. B. Div. 476, 482; *King v. Cope*, 1 Stra. 144; *King v. Leigh*, 1 Car. & K. 28; *Clifford v. Brandon*, 2 Campb. 858; *Wildee v. McKee*, 1 Cent. Rep. 919, 111 Pa. 335; *People v. Petheram*, 7 West. Rep. 592, 64 Mich. 252; *Emanuel's Case*, 6 City Hall Rec. 88.

¹ *State v. Pulte*, 12 Minn. 164; *Com. v. Putnam*, 29 Pa. 296; *State v. Ormiston*, 66 Iowa, 148; but not an abortion, *Scott v. Eldridge* (Mass.) 12 L. R. A. 379.

² *Davenport v. Lynch*, 51 N. C. 545.

³ *Hinchman v. Richie*, Brightly, 143; *Mintzer v. Sheriff* (Pa.) 1 Campb. Leg. Gaz. Rep. (Pa.) 340; *Com. v. Sheriff*, 8 Phila. 645.

⁴ *State v. Hickling*, 41 N. J. L. 208; *State v. Burlingham*, 15 Me. 104; *Com. v. Tibbette*, 2 Mass. 536; *Johnson v. State*, 26 N. J. L. 813; *Reg. v. Best*, 2 Ld. Raym. 1167; *Frudaty v. Childs*, 1 Sid. 68; *Rez v. Armstrong*, 1 Vent. 304; *Rez v. Rispol*, 1 W. Bl. 368.

⁵ *State v. Straw*, 42 N. H. 393; *State v. Simpson*, 12 N. C. 502.

⁶ *Miles v. State*, 58 Ala. 890.

⁷ *State v. Ripley*, 81 Me. 386.

⁸ *Spies v. People*, 10 West. Rep. 701, 122 Ill. 1.

⁹ *People v. Mather*, 4 Wend. 229; *Spies v. People*, 10 West. Rep. 701, 122 Ill. 1; *Smith v. State*, 21 Tex. App. 96.

¹⁰ Lord Gray (1682), 2 St. Tr. 519; *Rez v. Delaval* (1763), 8 Burr. 1434, 1 W. Bl. 410, 439; *Young's Case* (1780), cited in 1788 in *Rez v. Lynn*, 2 T. R. 733; *Reg. v. Mear* (1851), 2 Den. C. C. 79; *Reg. v. Howel* (1864), 4 Fost. & F. 160; *Anderson v. Com.* 5 Rand. 627; *State v. Burnham*, 15 N. H. 896; *State v. Parker*, 43 N. H. 83; *State v. Murphy*, 6 Ala. 765; *State v. Devitt*, 2 Hill, L. 282; *State v. Shooter*, 8 Rich. L. 172; *Mifflin v. Com.* 5 Watts & S. 461; *Smith v. People*, 25 Ill. 24.

¹¹ *O'Connell v. Reg.* 11 Clark & F. 155; *Spies v. People*, 10 West. Rep. 701, 122 Ill. 1; *Com. v. Blackburn*, 1 Duv. 4.

It includes conspiracy to excite discontent, disaffection and seditious opposition to the government; to promote ill will between different classes of citizens; to excite disaffection in the army; to attempt by show of physical force to secure alterations in the laws and government, through fear created thereby in the minds of those having power to effect such changes; to obstruct the execution of the laws; to defraud the government.¹

Conspiracies whose success would injuriously affect the operations of the government, even if not criminal, will create no enforceable rights in the parties thereto; see *ante*, chapter V. But if it involve a criminal violation of a statute,² or the bribery of an officer,³ or corruption of the appointing power,⁴ conspiracy will be punishable as a crime.

Bribery at any lawful election is a misdemeanor at common law, and an offer of money to an elector to induce him to vote at a municipal election is a criminal offense.⁵

To induce such action it is a crime to offer or promise a thing valuable at that time, or which will be valuable when according to the promise it is to be given or delivered.⁶ And in an indictment under the Revised Statutes of the United States it is not necessary to charge that the purpose sought was accomplished or that the voter, by reason of the bribe alleged, voted or refrained from voting, or voted otherwise than, without the bribe, he would have voted.⁷

¹*O'Connell v. Reg.* 11 Clark & F. 155; *Hazen v. Com.* 23 Pa. 355; *Reg. v. Dunn*, 12 Cox, C. C. 316; *Reg. v. Vincent*, 9 Car. & P. 91; *Reg. v. Shellard*, 9 Car. & P. 277; *Ku Klux Cases*, 1 Hughes, 439, 448, 458; *United States v. Watson*, 17 Fed. Rep. 145; *The Musuel Slough Case*, 5 Fed. Rep. 680; *United States v. McDonald*, 8 Biss. 439; *United States v. De Grief*, 16 Blatchf. 20; *The Star Route Cases* (Washington), 1882; *United States v. Frisbie*, 28 Fed. Rep. 808; *United States v. Boyden*, 1 Low. 266; *United States v. Nunnemacher*, 7 Biss. 111; *State v. Cardosa*, 11 S. C. 196; *Com. v. Kostenbauder* (Pa.) 3 Cent. Rep. 632; *Spies v. People*, 10 West. Rep. 701, 123 Ill. 1; *Re Baldwin*, 27 Fed. Rep. 193.

²*Com. v. McHale*, 97 Pa. 397.

³*Shircliff v. State*, 96 Ind. 369.

⁴*Re v. Pullman*, 2 Campb. 239; *Re v. Vaughn*, 4 Burr. 2494; *Com. v. Callaghan*, 2 Va. Cas. 460.

⁵*State v. Jackson*, 73 Me. 91.

⁶*Watson v. State*, 39 Ohio St. 123.

⁷*United States v. Stout*, 29 Fed. Rep. 897.

§ 67. **Conspiracies Affecting the Public Injuriously or against the Public Quiet.**—The law looks upon all conspiracies which endanger the public quiet and safety, or that of the individual members of the community, with disfavor, and will suppress all attempts to create such disturbance, and punish the conspirators.¹

A public meeting called to denounce the acts of the police while in the due performance of their duty and tending to excite armed resistance to lawful authority is an unlawful assembly and conspiracy and should be suppressed by legal authority.²

An understanding among officers charged with the execution of a statute that they will violate it or permit its violation is a conspiracy.³

But the intent to violate law must appear.⁴

So a conspiracy to induce public officers to violate the law or do acts not authorized is unlawful.⁵ Or to commit fraud at a legal election.⁶ Or to procure the appointment of an election officer.⁷ Or in an appointment to an office.⁸ So the sale by combination of unhealthy food is unlawful.⁹

So it will be also if private parties conspire to induce the violation of a statute.¹⁰ As a statute against the sale of liquor,¹¹ or a law to protect the Sabbath,¹² or to excite a riot or discontent,¹³ or trespass.¹⁴

So acts which will injure the public, if they are the subject of

¹ *State v. Burnham*, 15 N. H. 396; *United States v. Ravara*, 2 U. S. 2 Dall. 297, 1 L. ed. 388; *Com. v. Whitehead*, 2 Rep. 148; *State v. Farrier*, 8 N. C. 487; *State v. Taylor*, 8 Brev. 248; *Com. v. Tibbs*, 1 Dana, 525.

² *Spies v. People*, 10 West. Rep. 701, 123 Ill. 1.

³ *Wood v. State*, 1 Cent. Rep. 441, 47 N. J. L. 461.

⁴ *People v. Flack*, 11 L. R. A. 807, 125 N. Y. 884; *Stokes v. People*, 53 N. Y. 179.

⁵ *Com. v. Franklin*, 4 U. S. 4 Dall. 255, 1 L. ed. 823.

⁶ *United States v. Crosby*, 1 Hughes, 448.

⁷ *United States v. Watson*, 17 Fed. Rep. 145.

⁸ *Com. v. Callaghan*, 2 Va. Cas. 460; *Ree v. Pullman*, 2 Campb. 229.

⁹ *State v. Rowley*, 12 Conn. 101; *Reg. v. MacKarty*, 2 Ld. Raym. 1179.

¹⁰ *Haen v. Com.* 23 Pa. 855.

¹¹ *State v. Potter*, 28 Iowa, 554.

¹² *Com. v. Leeds*, 9 Phila. 569.

¹³ *Reg. v. Vincent*, 9 Car. & P. 91; *Reg. v. Shellard*, 9 Car. & P. 277.

¹⁴ *State v. Straw*, 42 N. H. 398; *Reg. v. Rowlands*, 17 Q. B. 636.

a combination to accomplish them, though neither immoral nor contrary to express statute in themselves, are within the reach of criminal proceedings.¹

And this although the disturbance only result in private injury.²

So conspiracies to give effect to an agreement against public policy, or to induce violations of law, or tending to a breach of the public peace, will not only give a civil action to one injured thereby, but be treated as criminal offenses.³

An offense against a seaman by a person who is not a seaman is not excluded from the English Conspiracy and Protection of Property Act 1875 (38 & 39 Vict. chap. 86) by § 16, which enacts that the Act shall not apply to seamen, as that means only that seamen are not to be punishable under the Act.⁴

So to defraud the State of taxes or customs by combination is criminal.⁵

§ 68. **Conspiracy Against the Due Administration of Justice.**—Contracts or agreements to obstruct the even course of public justice, or to pervert it, have been shown to be illegal and void (*ante*, § 21); and it is equally true, that whenever conspiracies, either in their purpose, or their execution, seriously point to such ends, the parties thereto become criminals.⁶

Thus to procure a forfeiture or conviction in order to divide the property among the conspirators.⁷

To destroy a will for this purpose.⁸

¹ *King v. Edwards*, 2 Strange, 707; *King v. Journeymen Tailors*, 8 Mod. 10.

² *Hunter's Case*, 1 Swinton, 550; *Anderson v. Com.* 5 Rand. 627.

³ *State v. Potter*, 28 Iowa, 554.

⁴ *Kennedy v. Cowie* [1891] 1 Q. B. 771.

⁵ *United States v. Boyden*, 1 Low. 266; *United States v. Bindskopf*, 6 Biss. 259; *Gardner v. Preston*, 2 Day, 205; *United States v. Smith*, 2 Bond, 323; *United States v. Dusten*, 2 Bond, 332; *United States v. Graff*, 14 Blatchf. 381; *United States v. Babcock*, 8 Dill. 581.

⁶ *State v. Caldwell*, 2 Tyler, 212; *State v. Harris*, 38 Iowa, 242; *Slomer v. People*, 25 Ill. 70, 76 Am. Dec. 786; *State v. McKinstry*, 50 Ind. 465; *Reg. v. Thompson*, 16 Q. B. 832; *People v. Washburn*, 10 Johns. 160; *United States v. Staats*, 49 U. S. 8 How. 41, 12 L. ed. 979; *State v. Dewitt*, 2 Hill, L. 282; *Com. v. McLean*, 2 Pars. Eq. Cas. 367; *State v. Norton*, 23 N. J. L. 38; *State v. Keys*, 8 Vt. 57; *Com. v. Douglass*, 5 Met. 241; *State v. Noyes*, 25 Vt. 415.

⁷ *Ashley's Case*, 12 Coke, 90. See also *Parker v. Huntington*, 2 Gray, 124; *Newall v. Jenkins*, 26 Pa. 159.

⁸ *State v. Dewitt*, 2 Hill L. 288.

To prevent competition at judicial sales.

To attempt to use or pervert legal process to private criminal ends and use of extra judicial proceedings.¹

To suppress, fabricate or falsify evidence in legal actions or proceedings.²

To prevent a prosecution for a crime,³ or acquit by bribery.⁴

Charging or indicting falsely.⁵ And this although indictment insufficient,⁶ or no process issue.⁷

To obstruct an officer.⁸

To procure a fraudulent judgment or decree, as a divorce.⁹

To entice one within the jurisdiction of the court.¹⁰

§ 69. **Conspiracies against Public Virtue and Individual Morality, Indictable.**—It has been already shown in the review of authorities that all attacks upon public virtue by combined effort are indictable.¹¹

So of a conspiracy to seduce a particular woman.¹²

Or to induce one to enter on a life of prostitution.¹³

¹ *Levi v. Levi*, 6 Car. & P. 239.

² *State v. Enloe*, 4 Dev. & B. 373; *Slomer v. People*, 25 Ill. 70; *State v. Shooter*, 8 Rich. L. 72; *Rez v. Hollingsberry*, 4 Barn. & C. 329; *Rez v. Taylor*, 15 Cox, C. C. 265.

³ *State v. Dewitt*, 2 Hill, L. 282; *Slomer v. People*, 25 Ill. 70; *Elkin v. People*, 28 N. Y. 177; *Com. v. Tibbette*, 2 Mass. 536; *Hood v. Palm*, 8 Pa. 237; *Rez v. Johnson*, 2 Show. 1; *Rez v. Stevenon*, 2 East, 362; *Rez v. Mawbey*, 6 T. R. 619.

⁴ *Claridge v. Hoare*, 14 Ves. Jr. 59.

⁵ *State v. McKinstry*, 50 Ind. 465; *State v. Dewitt*, 2 Hill, L. 282; *Rez v. Mawbey*, 6 T. R. 610.

⁶ *Rez v. Spragg*, 2 Burr. 993; *Rez v. MacDaniel*, 1 Leach, C. C. 44; *Slomer v. People*, 25 Ill. 70; *Elkin v. People*, 28 N. Y. 177; *State v. Buchanan*, 5 Harr. & J. 317; *Suydenham v. Kerloway*, Cro. Jac. 7 Plg. Hawk P. C. Curw. ed. 444, sec. 2; *Reg. v. Best*, 1 Salk. 174, 8 Mod. 321.

⁷ *Bloomfield v. Blake*, 6 Car. & P. 75, 1 Hawk, P. O. Curw. ed. sec. 3, p. 446.

⁸ *Com. v. Tibbette*, 2 Mass. 536.

⁹ *United States v. Smith*, 1 Dill. 212; *Cole v. People*, 84 Ill. 216; *State v. Noyes*, 25 Vt. 415; *State v. Ripley*, 31 Me. 386.

¹⁰ *Cole v. People*, 84 Ill. 216; *People v. Flack*, 11 L. R. A. 307, 125 N. Y. 324.

¹¹ *Cook v. Brown*, 125 Mass. 508; *Phelps v. Goddard*, 1 Tyler, 60.

¹² *King v. Grey*, 9 How. St. Tr. 127; *Rez v. Delaval*, 3 Burr. 1434.

¹³ *Smith v. People*, 25 Ill. 17; *Anderson v. Com.* 5 Rand. 627; *State v. Savoye*, 43 Iowa, 563; *King v. Grey*, 9 How. St. Tr. 127; *State v. Murphy*, 6 Ala. 765; *Rez v. Mear*, 2 Den. C. C. 79.

¹⁴ *Reg. v. Powell*, 4 Fost. & F. 160; *Reg. v. Mears*, 20 L. J. M. C. 59.

Or to induce a girl under the legal age to marry. ¹

Or to elope for purposes of prostitution or fornication. ²

§ 70. **Combinations to Cheat.**—An indictment for a conspiracy will not in general lie in those cases of fraud or trespass not affecting the person, for which an action or suit at law will afford adequate relief, if the intention of the conspirators was consummated, when the means intended to be resorted to are private. ³

In 2 East's C. L. title *Cheats*, cheats by conspiracy are treated of as being on the same footing with cheats affected by the use of false public tokens, as false weights and measures. Chitty in his 3d vol. title *Conspiracy*, after speaking of indictable conspiracies leveled at individuals, says, "but the object of conspiracy is not confined to an immediate wrong to particular individuals. It may be to injure public trade, to affect public health, to violate public policy, to obstruct public justice, or to do any act in itself illegal." Thus he takes a clear distinction between indictable combinations to injure individuals, and such as have for their object an injury to the public at large, or the commission of acts which are in themselves illegal, and on page 1140 he says "that to constitute a conspiracy, it is not necessary that the act itself should be itself illegal, or even immoral; that it should affect the public at large; or that it should be accomplished by false pretences."

If the purpose of a conspiracy is to injure or defraud the public, then the latter has a direct interest either residing in the community at large or in the State as a corporate body. If the object be to injure an individual, then the public has only an indirect interest as concerned in the maintenance of order, the administration of justice and the like. A conspiracy to injure the public is indictable, independent of the means employed. A conspiracy to injure a private individual only becomes subject to indictments through the intervention of statutes and rules of law defining what private injuries are regarded as detrimental to the public. ⁴

A conspiracy to defraud a corporation which is created for the

¹ *Respublica v. Hevise*, 2 Yeates, 114.

² *Anderson v. Com.* 5 Rand. 637; *Reg. v. Moore*, 2 Den. C. C. 79; *Reg. v. Powell*, 4 Fost. & F. 160.

³ *State v. Devitt*, 2 Hill, L. 283.

⁴ *State v. Cardozo*, 11 S. C. 195.

benefit of the public is a conspiracy affecting the public and indictable,¹ or to defraud the state itself. ²

A conspiracy to secure certain persons to be made directors of a corporation by unlawful means, in order to procure appointments to positions for the conspirators, is an indictable offense.³

A false token and counterfeit letter are things that may affect others than the intended objects of the cheat. They may to some extent maintain a credit with the public, and so be a public injury like spurious goods offered as genuine to the public,⁴ the making of which with such intent is indictable even if no sale be effected.⁵ So the making of illegal or spurious notes is indictable as liable to deceive the public;⁶ or cheating with bank notes or illegal or void bonds.⁷ But the means need not be resolved upon if the purpose to cheat is fixed,⁸ and it may be accomplished by conduct alone, with neither token nor words used.⁹ The mere agreement is the offense, the conspiracy constituting the crime, and it is equally one whether the purpose be to cheat an individual or a corporation; a class or community or company; a bank of circulation or deposit, whose loss will involve the public or the private creditors of the conspirators or any of them; so a conspiracy to obtain credit, or goods by pretense of solvency, or without the purpose of paying for them. The actual success of the conspiracy is simply an aggravation of the crime.¹⁰

¹*State v. Norton*, 23 N. J. L. 33; *State v. Young*, 37 N. J. L. 184; *Noyes v. State*, 41 N. J. L. 418; *State v. Burnham*, 15 N. H. 396; *People v. Trim*, 39 Cal. 75; *Com. v. Foering*, Brightly, 315; *State v. Buchanan*, 5 Harr. & J. 317.

²*State v. Cardoso*, 11 S. C. 196.

³*State v. Burnham*, 15 N. H. 396.

⁴*State v. Rickey*, 9 N. J. L. 364.

⁵*Com. v. Hunt*, 4 Met. 111; *Com. v. Judd*, 2 Mass. 329.

⁶*Com. v. McGowan*, 3 Pars. Eq. Cas. 341; *Clary v. Com.* 4 Pa. 310.

⁷*State v. Van Hart*, 17 N. J. L. 327; *Twitchell v. Com.* 9 Pa. 211; *Clary v. Com.* 4 Pa. 310; *Com. v. Gallagher*, 2 Pa. L. J. 297.

⁸*Rex v. Gill*, 2 Barn. & Ald. 204.

⁹*People v. Clark*, 10 Mich. 310.

¹⁰*Com. v. Davis*, 9 Mass. 415; *State v. Murphy*, 6 Ala. 765; *Com. v. Foering*, Brightly, 315; *Reg. v. Orbell*, 6 Mod. 42; *Reg. v. Esdaile*, 1 Fost. & F. 213; *Heymann v. Reg.* L. R. 8 Q. B. 102; *Reg. v. Peck*, 9 Ad. & El. 686; *State v. Norton*, 23 N. J. L. 33; *Com. v. Ward*, 1 Mass. 473; *Com. v. Eastman*, 1 Cush. 189; *State v. Buchanan*, 5 Harr. & J. 317; *People v. Underwood*, 16 Wend. 546; *State v. Simons*, 4 Strobb. L. 266; *Whitman v. Spencer*, 2 R. I. 124; *Johnson v. Davis*, 7 Tex. 173; *Hall v. Eaton*, 25 Vt. 458.

A fraudulent agreement by a member of a firm with third persons, wrongfully to deprive his partner by false entries and false documents of all interest in some of the partnership property on taking account for a dissolution is a conspiracy at common law,¹ or to issue and circulate partnership paper to pay individual debts. As this may affect the public as a false credit, the conspiracy may be perhaps treated as a public injury;² or issuing fictitious bill in name of a non-existing firm.³

The use of false public tokens—false weights and measures—evinces a fixed purpose to defraud the entire community. It is not the yielding to sudden temptation that may perhaps be exhibited in case of a private cheat, and not therefore indictable, but it proves a deliberate purpose to use the means selected by the law to secure accuracy and fair dealing, to deceive the public. Of course such a cheat, clothing itself in the garb of legal honesty, will deceive where a private cheat would fail, and naturally such a use of public tokens is punished *criminaliter*, both to protect the public and to punish abuse of the means the law has selected to shield the public from fraud. All conspiracies to cheat by such means, as well as to cheat by means which, if employed by an individual would render him criminally liable, are therefore indictable.⁴ Fraudulently filling up stolen railroad tickets in pursuance of a conspiracy to pass them is indictable;⁵ so falsely representing the condition of a corporation,⁶ or of public stocks. It is the deliberate determined purpose to defraud and the unlawful and dangerous means employed in the use of public tokens, without acting in concert, that demand interposition of the criminal law, and for the same reasons, false, fraudulent, or malicious conspiracies, to cheat or otherwise injure a third person, are indictable offenses, because ordinary care cannot as effectually protect

¹ *Reg. v. Warburton*, L. R. 1 C. C. 274.

² *State v. Cole*, 89 N. J. L. 324.

³ *Rea v. Hoey*, 2 East, P. C. 856.

⁴ *Williams v. Com.* 84 Pa. 178; *Clary v. Com.* 4 Pa. 210; *Collins v. Com.* 3 Serg. & R. 220; *State v. Norton*, 23 N. J. L. 53; *State v. Buchanan*, 5 Harr. & J. 317; *State v. Spaulding*, 19 Conn. 284; *State v. De Witt*, 3 Hill, L. 282; *State v. Bradley*, 48 Conn. 536; *State v. Trammell*, 24 S. C. 379.

⁵ *Bloomer v. State*, 48 Md. 521.

⁶ *Reg. v. Brown*, 7 Cox, C. C. 442; *Reg. v. Gurney*, 11 Cox, C. C. 439; *Reg. v. Aspinall*, L. R. 1 Q. B. Div. 780.

the individual from the machinations of a band of conspirators, as against a single cheat. Fraud, falsehood and malice are at war with social order and commercial prosperity, and whenever they assume a form against which ordinary care and prudence will not serve as a protection, the law will treat that form as a criminal weapon, and punish those using it. It will punish a false pretense in a conspiracy which would not sustain a prosecution for the statutory crime of obtaining under false pretenses, and where the wrong inflicted is simply an equitable one,¹ but still there must be more than a false promise, or extravagance in valuation, and the wrong inflicted or contemplated must be to the ownership and not to temporary possession of the property only.

But a false representation of quality or soundness, or the fact of purchase or sale is sufficient.²

It was a long and difficult task to separate the idea of a criminal conspiracy at common law, where the agreement or conspiracy was the gravamen of the offense, from the real complaint in a civil action, that the combination of two or more persons has enabled them to inflict a great wrong on the plaintiff. The combination or conspiracy in the latter case is therefore a matter of aggravation or inducement only, of which one or all might be found guilty; while in the former, it was essential to show that two or more had joined in an agreement to do an unlawful act, or to do a lawful act in an unlawful manner. The distinction is now well established that in civil actions the conspiracy is not the gravamen of the charge, but may be both pleaded and proved as aggravating the wrong of which the plaintiff complains, and enabling him to recover against all as joint tort-feasors. If he fails in the proof of a conspiracy or concerted design, he may still recover damages against such as are shown to be guilty of the tort without such agreement.³

An act may not be innocent, and yet not be indictable, where

¹ *Reg. v. Warburton*, L. R. 1 O. C. 274.

² *Reg. v. Kenrick*, 5 Q. B. N. S. 49; *Reg. v. Carlisle*, 23 L. J. M. C. 109; *Com. v. Philadelphia County Prison Supt.* 6 Phila. 169; *Reg. v. Lewis*, 11 Cox, C. C. 404; *Reg. v. Aspinall*, L. R. 1 Q. B. Div. 780; *Reg. v. Orman*, 14 Cox, C. C. 881.

³ *Pol. Torts*, 267; *Garing v. Fraser*, 76 Me. 87; *Hutchins v. Hutchins*, 7 Hill, 104; *Jones v. Baker*, 7 Cow. 445; *Parker v. Huntington*, 2 Gray, 124; *Van Horn v. Van Horn*, 10 L. R. A. 184, 52 N. J. L. 284.

it is the isolated act of an individual and does not so injuriously affect society as to require the intervention of the law, but when acts innocent in themselves, but to accomplish a cheat, are committed by numbers in furtherance of a common object, and with the advantages and strength which concentrated determination impart to them, they assume the grave importance of a conspiracy and the peace and order of society require their repression.¹

All combinations in society to effect an evil purpose are dangerous, and when their object and purpose is to cheat by whatever means, an individual, they are obnoxious to the law.²

In *The Poulterers Case* (1611), it was determined that the agreement for a combination, where the criminal intent is manifested by the agreement, is indictable, and as the essence of conspiracy is in the intent, the requirement in the case of statutory deceit, that the proposed pretense should be reasonably calculated to accomplish the object, would not necessarily apply to an agreement for a combination. Nor would it, when the evil intent is proved, be required that the means contemplated should be reasonably sufficient to accomplish the general purpose, as is necessary in case of an attempt to commit some other crimes. This view finds support in the ancient cases for conspiracy to commit treason, and clearly special circumstances, preventing the use of the means in a special case, which might defeat a prosecution for an attempt, would not defeat such prosecution for a conspiracy. But it is supposed a court would find it difficult to satisfy itself of the intent, where the means contemplated were plainly not in any event adapted to accomplish the purpose.

It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretenses and subtle means to defraud, cheat, or injure another.³ Conspiracies to defraud by obtaining money or goods by false pretenses are indictable.⁴

¹ *Reg. v. Lara*, 2 Leach, C. C. 647; *Reg. v. MacKarty*, 2 Ld. Raym. 1179; *Reg. v. Wheally*, 2 Burr. 1127; *Roy v. Skirret*, 1 Sid. 312; *Reg. v. Orbell*, 6 Mod. 42; *Com. v. Boynton*, 2 Allen, 160; *State v. Rowley*, 12 Conn. 101; *Com. v. Hunt*, Thach. Crim. Cas. (Mass.) 609, 640.

² *State v. Burnham*, 15 N. H. 396; *Twitchell v. Com.* 9 Pa. 211.

³ *Reg. v. Warburton*, L. R. 1 C. C. 274; *State v. Cole*, 89 N. J. L. 324; *Cole v. People*, 84 Ill. 216.

⁴ *Com. v. Wallace*, 16 Gray, 221; *Com. v. Shedd*, 7 Cush. 514; *Com. v. Eastman*, 1 Cush. 189; *Alderman v. People*, 4 Mich. 414; *State v. Jones*, 18 Iowa, 269; *State v. Roberts*, 34 Me. 822; *State v. Hewett*, 81 Me. 396; *Re*

So cheating by means of conspiracy in sham bidding at auction is criminal;¹ or attempting by conspiracy to obtain funds in a false name;² or to obtain real estate.³

There are in cases of an early date, followed by later ones, either decisions or *dicta*, English and American, declaring that a combination for the commission of acts unlawful in a moral sense, or by means morally wrong, is indictable.⁴

This view has been supposed to be questioned by some modern cases, and they are construed as holding that, to constitute a criminal conspiracy, there must have been an unlawful or criminal purpose, or the use of unlawful or criminal means—a combination to promote an end in some degree criminal, or to effect an end by means having some degree of criminality.⁵ But it has been held an offense at common law for a prisoner to escape from jail; and for one to solicit another to commit adultery. Neither of these acts are forbidden by statute, yet it was held in each case, after the act, that it was an offense. There is no more real hardship in

Wolf, 27 Fed. Rep. 606; *State v. Murphy*, 6 Ala. 765; *State v. Simons*, 45 Strobb. L. 266; *Com. v. Walker*, 108 Mass. 309; *Com. v. Boynton*, 2 Allen, 160; *Com. v. Eastman*, 1 Cush. 189; *Clary v. Com.* 4 Pa. 210; *Johnson v. People*, 22 Ill. 814; *State v. Norton*, 23 N. J. L. 83; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *State v. Clary*, 64 Me. 869; *Twitcheil v. Com.* 9 Pa. 211; *Bloomer v. State*, 48 Md. 521; *Com. v. Philadelphia County Prison Supt.* 6 Phila. 169; *State v. Shooter*, 8 Rich. L. 72; *Reg. v. Stenson*, 12 Cox, C. C. 111; *Reg. v. Kenrick*, 5 Q. B. 49; *Reg. v. Hudson*, 8 Cox, C. C. 805; *Reg. v. Brown*, 7 Cox, C. C. 442; *Reg. v. Eadsile*, 1 Fost. & F. 218; *Reg. v. Gomperts*, 9 Q. B. 824; 8 Russ. Cr. (4th ed.) p. 116; *State v. Keach*, 40 Vt. 118; *Com. v. Harley*, 7 Met. 462; *Com. v. Warren*, 6 Mass. 74; *Com. v. Ward*, 1 Mass. 473; *State v. Crowley*, 41 Wis. 271; *Evans v. People*, 90 Ill. 885; *Johnson v. People*, 22 Ill. 814; *People v. Clark*, 10 Mich. 810; *Miller v. State*, 79 Ind. 198; *State v. Jackson*, 7 S. C. 288; *Henswood v. Com.* 52 Pa. 424; *State v. Parker*, 43 N. H. 88; *Com. v. McKisson*, 8 Serg. & R. 420; *Isaacs v. State*, 48 Miss. 284; *State v. Younger*, 12 N. C. 857; *Brannock v. Bouldin*, 26 N. C. 61; *Com. v. Gillespie*, 7 Serg. & R. 469; *State v. Harwood*, 75 N. C. 210.

¹*Reg. v. Lewis*, 11 Cox, C. C. 404.

²*Rea v. Robinson*, 1 Leach, C. C. 87.

³*People v. Richards*, 1 Mich. 216; *State v. Shooter*, 8 Rich. L. 72.

⁴*State v. Norton*, 23 N. J. L. 83; *State v. Parker*, 43 N. H. 85; *State v. Buchanan*, 5 Harr. & J. 317; *Com. v. Judd*, 2 Mass. 329; *State v. Lurnham*, 15 N. H. 896; *Rea v. Sidley*, K. B. 15 Car. II (1664); *Le Roy v. Sidney*, 1 Sid. 168, 1 Keble, 620; *Jones v. Randall*, Loft, 884, 1774; *Wiffin v. Com.* 5 Watts & S. 461; *Anderson v. Com.* 5 Rand. 627; *State v. Murphy*, 6 Ala. 765; *Com. v. Ward*, 1 Mass. 473.

⁵*Com. v. Shedd*, 7 Cush. 514; *Com. v. Eastman*, 1 Cush. 189; *Com. v. Wallace*, 16 Gray, 221; *State v. Keach*, 40 Vt. 118; *Com. v. Hunt*, 4 Met. 111; *State v. Hewitt*, 81 Me. 896; *State v. Ripley*, 81 Me. 886; *State v. Roberts*, 84 Me. 820; *Alderman v. People*, 4 Mich. 414.

holding the crime of conspiracy as an offense, although it contemplated the violation of no express statute. The danger that an innocent man will be punished criminally for a conspiracy, because the act he, with others, contemplated was not forbidden by statute, cannot be admitted as existing. It cannot be supposed that a prosecution will be instituted and sustained by the court and jury, unless the acts done or contemplated are clearly illegal and morally wrong; so much so that as to leave little or no room for a right minded man to doubt. Thus such a person could not doubt the criminality of a combination corruptly or maliciously to deprive another of his liberty or property.¹ An expansion of the law of conspiracy will only be indulged as a correction of disorder which would else be without cure, or as a curb to the immoderate power to do mischief which is gained by a combination of means.² "*Lex non exacte definit, sed arbitrio boni viri permittit.*"

A conspiracy to defraud individuals or a corporation of their property, real or personal, may in itself constitute an indictable offense, though the act done or proposed to be done in pursuance of the conspiracy be not in itself indictable.³

Conspirators to secure a debt under pretense of official authority, if not entitled to the security, are liable to prosecution.⁴ But a combination to secure payment of a just debt by false pretense is not indictable.⁵

¹ *State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 46.

² *Com. v. Mifflin*, 5 Watts & S. 461.

³ *Reg. v. MacKarty*, 2 Ld. Raym. 1179; *Reg. v. Orbell*, 6 Mod. 42; *Reg. v. Wheatly*, 2 Burr. 1127; *Reg. v. Cope*, 1 Strange, 144; *Reg. v. Mauley*, 6 T. R. 619; *Reg. v. Best*, 6 Mod. 185; *Reg. v. De Berenger*, 3 Maule & S. 67; *Reg. v. Roberts*, 1 Campb. 899; *Reg. v. Best*, 2 Ld. Raym. 1167; *Sydeserf v. Reg.* 11 Q. B. 245; *Reg. v. Gomperts*, 9 Q. B. 824; *Reg. v. Kenrick*, 5 Q. B. 49; *Reg. v. Button*, 11 Q. B. N. S. 929; *Com. v. Judd*, 2 Mass. 329; *State v. Buchanan*, 5 Harr. & J. 817; 8 Ohitt. Cr. Law, 1188; Arch. Cr. Law, 890; 2 Russ. Cr. 558; Dougherty, Cr. Cons. 118, 129, 184, 140; Stubbs, Cr. Cons. 287, 248, 245, 249, 252; *State v. Norton*, 28 N. J. L. 88, rejecting the dicta in *State v. Rickey*, 9 N. J. L. 864; *Lambert v. People*, 7 Cow. 166, 9 Cow. 578; *Levi v. Levi*, 6 Car. & P. 239; *Tompkins v. State*, 17 Ga. 856; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Twitchell v. Com.* 9 Pa. 211; *Patten v. Gurney*, 17 Mass. 182; *State v. Younger*, 12 N. C. 857; *State v. Shooter*, 8 Rich. L. 73; *State v. Simons*, 4 Strobb. L. 266; *Reg. v. Wilson*, 8 Car. & P. 111; *Bean v. Bean*, 12 Mass. 20; *State v. Jackson*, 7 S. C. 283; *State v. Trammell*, 24 N. C. 879; *Com. v. Ward*, 1 Mass. 478.

⁴ *Bloomfield v. Blake*, 6 Car. & P. 75.

⁵ *People v. Bradford*, 1 Wheel. Crim. Cas. 219.

So a conspiracy to defraud a third person by means of an act not *per se* unlawful, and though no person be thereby injured.¹

There is no difference between a conspiracy to commit an act which is unlawful at common law and one to commit an act declared to be unlawful by statute; and hence a conspiracy to defraud, being indictable at common law, is properly governed by How. (Mich.) Stat. § 9434, providing a punishment for offenses indictable at common law and not expressly provided for by statute.²

An indictment will lie for a bare conspiracy to cheat or defraud a third person though the means of effecting it should not be determined at the time.³

The United States has declared it a criminal offense to use the mails for the purpose of defrauding. The offense consists: 1st. In devising or intending to devise a scheme or artifice to defraud. 2d. In opening or intending to open correspondence or communication with some other person, or inciting such person to open correspondence by means of the post-office with the person devising the scheme. 3d. In pursuance of the scheme putting a letter or packet in the mail or taking one from the mail.⁴

The attempt by an insolvent person to secure credit, or the ordering of goods without present means to pay for them, or the concocting a scheme after ordering goods to avoid paying for them, does not come within the statute.⁵

¹ *Reg v. Robinson* (1744) 1 Leach, C. C. 87; *Reg v. De Berenger*, 8 Maule & S. 68; *Reg v. Edwards* (1725) 1 Strange, 707, 1 Sess. Cas. 886, 8 Mod. 320; *Twitchell v. Com.* 9 Pa. 211.

² *People v. Watson*, 75 Mich. 582.

³ *Reg v. Gill* (1818) 2 Barn. & Ald. 204.

⁴ U. S. Rev. Stat. § 5480; *United States v. Wootten*, 29 Fed. Rep. 702.

⁵ *United States v. Wootten*, 29 Fed. Rep. 702.

CHAPTER XIV.

CONSPIRACY AT COMMON LAW—CONTINUED.

- § 71. *Conspiracy to Extort Anything of Value from an Individual.*
- 72. *Conspiracy to Slander.*
- 73. *Conspiracies Relating to Trade and Labor.*
- 74. *Development of the Doctrine of Conspiracy in Trade Combinations.*
- 75. *Statutes in England and the United States Regarding Combinations among Workmen.*

§ 71. **Conspiracy to Extort Anything of Value from an Individual.**—Conspiracies to extort anything of value from an individual or corporation or company or class, by threats or intimidation, are in themselves criminal.¹ Thus a conspiracy to obtain security for a debt, if the party for whose benefit the security is sought is not entitled to it, under pretense of judicial authority for making the demand, is indictable.² So a conspiracy to induce one to bring a charge of theft against another falsely, to force a payment of money to avoid prosecution or through fear of disgrace is punishable.³ So a false charge of obtaining goods by fraud, sustained by an oath of one of the conspirators for the purpose of extortion, is indictable.⁴ And if the purpose be extortion, the truth of the charge will not relieve from the criminality,⁵ and whether it be of a criminal act or not is immaterial.⁶

§ 72. **Conspiracy to Slander.**—Conspiracies are odious in law, and are always taken *mala parte*, and properly so. In *Rex v. Rispal*, 3 Burr. 1320, 1 W. Bl. 368, Lord Mansfield declared of verbal slanders that “they tended to a breach of the peace as

¹*State v. Shooter*, 8 Rich. L. 72; *State v. Stewart*, 59 Vt. 273; *Rex v. Hollingberry*, 4 Barn. & C. 329, 1 Hawk. P. C. 72, § 7; *Bloomfield v. Blaks*, 6 Car. & P. 75.

²*Bloomfield v. Blaks*, 6 Car. & P. 75.

³*State v. Carwood*, 2 Stew. (Ala.) 360.

⁴*Raleigh v. Cook*, 60 Tex. 488.

⁵*Rex v. Hollingberry*, 4 Barn. & C. 329.

⁶*Rex v. Rispal*, 3 Burr. 1320.

much as cheats and libels." That is the only reason assigned in the books why libels are punishable by indictment; and whether they have in fact a more direct tendency to a breach of the peace than verbal slanders, which are not *per se* so punishable, it is now too late to inquire as it is thus settled. Undoubtedly a written libel displays more settled malignity of spirit, and intends and inflicts more lasting and irritating wounds than a verbal slander, which perhaps in utterance exhaled all the heat which engendered it. The written libel therefore is the most dangerous to the public peace and good order.

But the law recognizes that a conspiracy to utter a verbal slander involves the same deliberation and malice as a written libel, and the union of numbers in such a purpose is as dangerous as in other combinations for evil.¹ An indictment may therefore be sustained for a conspiracy to slander a person to extort money from another or to injure his reputation by means not indictable if practiced by an individual, as by verbal defamation, and that whether it charge him with an indictable offense or not, or whether intended to institute a prosecution.²

In a recent case decided by the Supreme Court of Pennsylvania at Pittsburg, on appeal, the Cigarmakers' International Union No. 126 of Ephrata, Lancaster County, by bill in equity had restrained cigar manufacturer John H. Brendle, from using the Cigarmakers' International Union label on his goods. The county court sustained the master's report in behalf of this injunction. Brendle is a union manufacturer who had incurred the ill will of local officials and refused to use their labels. He issued similar labels or trade marks of his own, and appealed to the Supreme Court from the injunction.

¹ *Reg. v. Rowlands*, 2 Den. C. C. 364.

² *Timberley v. Child* (1668) 1 Sid. 68; *Rea v. Kimberly*, 1 Lev. 62, 1 Keb. 254; *Childs v. North*, 1 Keb. 208; *Rea v. Armstrong*, (1678) 1 Vent. 304; *Reg. v. Mackarty* (1705), 2 Ld. Raym. 1179; *Reg. v. Best* (1705) 2 Ld. Raym. 1167, 1 Valk. 174, 6 Mod. 185; *Rea v. Kinnerley* (1719), 1 Strange, 198; *Rea v. Bryan* (1780), 2 Strange, 866; *Rea v. Parsons* (1768), 1 W. Bl. 392; *Rea v. Rupal* (1762), 3 Burr. 1820, 1 W. Bl. 368; *Rea v. Hollingberry* (1825), 4 Barn. & C. 829; *Reg. v. Kenrick*, 5 Q. B. 49; *Johnson v. State*, 26 N. J. L. 818; *Reg. v. Gomperts*, 9 Q. B. 825; *Reg. v. Button*, 12 Jur. 1017; *State v. Burlingame*, 15 Me. 104; *State v. Stevens*, 30 Iowa, 891; *State v. Oatwood*, 2 Stew. (Ala.) 860; *Com. v. Tibbette*, 2 Mass. 536; *Leggett v. Postley*, 2 Paige, 599, 2 L. ed. 1046; *Com. v. Warren*, 6 Mass. 74; *Lambert v. People*, 7 Cow. 166; *Com. v. Ward*, 1 Mass. 478; *State v. Buchanan*, 5 Harr. & J. 817; *State v. Rowley*, 12 Conn. 101; *State v. Hickley*, 41 N. J. L. 208.

The court in refusing to continue the injunction, reverses the lower court's decision on the ground that the cigarmakers' union, formed for the "mental, moral, and physical welfare of its members," is a personal and social organization, not a commercial one, and under the law of Congress, therefore, cannot own a trade-mark. An especially interesting feature of the decision is its discussion of the social claim, set forth in terms upon the union cigar label, to the exclusive right not only to the use thereof, but stigmatizing all workmen not permitted to use the trade-mark as inferior men. The label describes the cigars it accompanies as being made by first-class workmen, and adds that all cigars not having the label are of "inferior, rat shop, cooley, prison, or filthy tenement house workmanship," and has a note therefore "recommending these union cigars to all smokers throughout the world."

The opinion says: "This is an attempt to use the public as a means of coercion in order to find a market for their goods or labor. A first-class workman is one who does first-class work, whether his name is on the rolls of any given society or not. Filthiness and criminality of character depend on conduct, not on membership of the union. Legitimate competition rests on superiority of workmanship and business methods, not on the use of vulgar epithets and personal denunciations.

"The International Union in this case has an avowed purpose to do harm to non-union men, to prevent the sale of their work, to cover them with opprobrium, and they ask a court of equity to say they have a right to do so. We decline to say so."

§ 73. *Conspiracies Relating to Trade and Labor.*—The recognized rule¹ that contracts in restraint of trade, and depriving the public of the avails of labor, are illegal, carries with it the result, that all combinations and conspiracies to accomplish the same results are criminal, as they are aimed at an illegal object.²

¹ *Mitchel v. Reynolds*, 1 P. Wms. 181; *Lumbar's Case* (1869) 48 As. 276; *Midwinter v. Scroggs* (1636), 1 Keb. 636; *Rez v. Eccles* (1788), 1 Leach, C. C. 274; *Rez v. Waddington* (1800), 1 East, 148; *Rez v. De Berenger* (1814) 8 Maule & S. 67; *Grose, J.*, in *Rez v. Maubery* (1796), 6 T. R. 619; *Rez v. Hammond* (1799) 2 Esp. 719.

² *Compton, J.*, in *Hilton v. Eckersley*, 6 El. & Bl. 47, 25 L. J. Q. B. 199, and *Compton and Hill, J.J.*, in *Walsby v. Anley* (1861), 8 El. & Bl. 516, 80 L. J. M. C. 121, and authorities cited under "Conspiracy Defined," *supra*, section 65.

A conspiracy is indictable to deter a man from retaining and employing an attorney to prosecute or defend his cause, under penalty of being published as a "scab," and having his name held up to public ridicule and contempt, because the attorney did not belong to a particular bar association; or to deter employers in their selection and employment of particular workmen by violence, threats, coercion or intimidation; or for journeymen to combine to prevent the employment of apprentices through intimidating their employers is indictable.¹

§ 74. **Development of the Doctrine of Conspiracy in Trade Combinations.**—In England the matter is now regulated largely by statute. In this country, in 1806, there was a trial of certain boot and shoe makers of Philadelphia, before the mayor of that city, for conspiring to increase the rates of wages, and to prevent others from working at less wages, but no general principle was distinctly asserted, unless it was, that what each individual might lawfully do became criminal when each became "bound down by their agreements, and pledged by mutual engagements, to persist in it, however contrary to their own judgment." And it was said "the continuance in improper conduct may therefore well be attributed to the combination." In 1809, in the *Journeymen Cordwainers of New York*, the mayor expressly omitted to decide whether an agreement not to work except for certain wages would be indictable *per se*.²

In a *habeas corpus* case, *Com. v. Carlisle*, Brightly (Pa.) 36, in 1821, before Judge Gibson of the Supreme Court, he held that while the mere act of combining to change the price of labor is, perhaps, evidence of impropriety of intention, it is not conclusive, for if the accused can show that the object was not to undervalue labor but to foil their antagonists in an attempt to assign to it, by surreptitious means, a value which it would not otherwise have, they will make out a good defense. Accordingly a combination of employers to depress the wages of journeymen below what they should be, if there was no recurrence to artificial means by either

¹*State v. Stewart*, 59 Vt. 278; *People v. Fisher*, 14 Wend. 9; *Rea v. Ferguson*, 2 Starke, 489; *Reg. v. Hewitt*, 5 Cox, C. C. 162; *Walsby v. Anley*, 3 L. T. N. S. 666.

²1 Select Cases New York, p. 111; *People v. Melvin*, 2 Wheeler, Crim. Cas. 262.

side, is criminal. The motive may be as important to induce as to avoid an inference of criminality. After the Court for the Correction of Errors, of New York, had reversed, by the casting vote of the President, the judgment of the Supreme Court in *Lambert v. People*, 7 Cow. 166, 9 Cow. 578, declaring by such reversal that in a conspiracy to commit a criminal act, the means need not be stated, but if the act is not illegal in itself, the means must appear to be so, and leaving doubtful the law as to what constituted a conspiracy to inflict mere private injury, not affecting the public, the Legislature having defined criminal conspiracy, and among other things declared it covered a combination to commit an act injurious to trade or commerce, it was held in *People v. Fisher*, 14 Wend. 9, that a body of journeymen shoemakers violated the statute by combining for the purpose of preventing any other workmen, whether belonging to their organization or not, from working below prices fixed by them. Here the conspiracy reached others outside the society and indeed it prevented the master, under penalty of being deserted by the associated workmen, from employing anyone at less wages, and it excluded other workmen from accepting work at less prices.

A combination producing such a result was thus characterized in *Com. v. Carlisle*, Brightly (Pa.) 36. Whenever the act, agreed among several to be done, must necessarily injure the public or oppress individuals, by enabling those confederating to exercise an unlawful power, such action taking effect either in extortion or mischief upon such individuals or the public, constitutes a conspiracy.¹

It is the duty of the state to protect the individual citizen against the combined power of numbers to injure him in his legitimate business pursuits².

In *Com. v. Hunt*, 4 Met. 111, Chief Justice Shaw did not regard the union of workmen, under an agreement not to accept employment from one who would take into his service others than

¹*Rea v. Kenrick*, 5 Q. B. 49; *State v. Stewart*, 4 New Eng. Rep. 378, 59 Vt. 278; *Com. v. Carlisle*, Brightly (Pa.) 36; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *State v. Donaldson*, 32 N. J. L. 151; *State v. Cole*, 39 N. J. L. 324; *State v. Hinckling*, 41 N. J. L. 208; *Reg. v. Warburton*, L. R. 1 C. C. 274; *Johnson v. State*, 26 N. J. L. 818; *Johnson v. State*, 29 N. J. L. 453; *State v. Burnham*, 15 N. H. 396; *State v. Parker*, 43 N. H. 83.

²*State v. Rowley*, 12 Conn. 112; *Reg. v. Duffield*, 5 Cox, C. C. 423.

members of the association, or retain them after notice of the agreement, as in itself illegal, unless improper purposes were contemplated by the union. Such an agreement he held might be legal or illegal as its purpose was either to secure an advancement in the social or business life of its members, or to secure power for purposes of injustice or oppression. It was stated that if a large number of men, engaged for a fixed time, should combine together to violate their contracts, and quit their employment together, it would be a conspiracy to do an unlawful act, which if done by one person, would give a civil action. It was considered that an association may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another; that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association was therefore held to depend upon the means to be used for its accomplishment. If it is carried into effect by fair and honorable or lawful means, it is to say the least, innocent; if by falsehood or force it may be stamped with the character of conspiracy. The question of criminality will be determined by the means, and they must be stated in the indictment. In *Hartford Carpet Weavers Case* (Super. Ct. Conn. 1836), and in *Master Stevedores Asso. v. Walsh*, 2 Daly, 5, 1867, the right to regulate the price at which members of the union should work was recognized, and the same right was recognized on the part of employers to fix the wages they would pay. In the latter case the penalty was enforced against a member of the association.

In *State v. Donaldson*, 32 N. J. L. 151, 1867, notice was given to the employer by the confederated workman that they would quit his service unless two designated workmen were discharged. And the threat was carried into effect. This was held an unlawful combination, as attempting to dictate to the employer whom he should employ and whom discharge. It was declared to be an attempt to control the business of the employer. The case of *Com. v. Hunt*, 4 Met. 111, is in the course of the opinion in *State v. Donaldson* approved, as in that case no purpose was shown to exercise such control over the employer, but simply to control its own members. The ruling in *Com. v. Curren*, 3 Pittsb. 143, in 1869,

also denied the right of combined employés to dictate who shall be employed or discharged.

§ 75. **Statutes in England and the United States Regarding Combinations among Workmen.**—In England, the Act of 1875, Concerning Conspiracy and for the Protection of Private Property, declares that “an agreement or combination of two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as a crime.” § 3.

The law is now well settled that workmen have a right to combine for their own protection, and to obtain such wages as they may themselves, after consideration, agree to insist upon receiving for their work;¹ and while they are perfectly free from engagement, and at liberty to exercise the option of entering into employ or not, they have a right to agree among themselves not to accept any employ unless they can secure a certain rate of wages.²

Associations of workingmen for mutual protection and improvement under the names of “Friendly Societies” are made quasi corporate bodies, and their regulations and rules are often the test of the legality of their organization and existence.

In *Farrer v. Close*, L. R. 4 Q. B. 612, Cockburn, *Ch. J.*, and Mellor, *J.*, held that the evidence in this case showed that the rules in practice are applied so as to render the funds of the society in question available for the purpose of supporting strikes, by allowing sums of money to workmen in order to prevent them from seeking work in districts where men are on a strike, and also by giving assistance to other branch associations in whose districts strikes are going on; that these purposes are not of a friendly society, but of a trade’s union, and as such, are illegal as being in restraint of trade, according to *Hornby v. Close*, L. R. 2 Q. B. 153, and that the justices trying the case were right in so ruling.

¹*Reg. v. Rowlands*, 5 Cox, C. C. 436, 460.

²*Reg. v. Duffield*, 5 Cox, C. C. 404, 431; *Reg. v. Hibbert*, 18 Cox, C. C. 82; *Com. v. Hunt*, 4 Met. 111, 180; *State v. Donaldson*, 83 N. J. L. 151; *Carew v. Rutherford*, 106 Mass. 1; *Master Stevedores Assn. v. Walsh*, 2 Daly, 1.

Cockburn, *J.*, said: "The only question in the case was whether a certain society called the Amalgamated Society of Carpenters and Joiners, is essentially a 'friendly society' so called, so as to be within the protection of 18 and 19 Vict. chap. 63, §§ 24 and 44, and that the question turns on the construction to be placed on certain rules of the society, especially § 7 of Rule 18, that 'any free or non-free member or members leaving his or their employment, under circumstances satisfactory to the branch, or executive council, shall be entitled to the sum of 15*s.* per week.' The society must be treated, not according to what it professes to be, but according to what it practically is; otherwise the society might be framing its rules ambiguously, so as to be capable of being applied to carry out the purposes of a friendly society, or those of a trade's union, and while carrying on its operations as a trade's union evade the law and obtain advantages secured by statute to a friendly society, which would be refused to it if its true character were known."

Hannen, *J.*, said: "Strikes are not necessarily illegal. A strike is properly defined as 'a simultaneous cessation of work on the part of the workmen,' and its legality or illegality must depend upon the means by which it is enforced and on its objects. No doubt the trade of the employer is restrained when workmen decline to take the wages which he is willing to give; but it must be remembered that the men are contractors as well as the employers, and it would be an odd way of promoting the freedom of trade to hold it an illegal purpose on their part to endeavor, out of their own savings, to put themselves in a better position to get what they think is a fair price for their labor. The question whether a society has been established for illegal purposes or not ought, with rare exceptions, to be decided by the rules themselves which declare the objects of the society and speak the voices of all its members. To explain and interpret these rules by vague general evidence of what may be sometimes done, is objectionable on principle as explaining written documents by loose parol evidence as to the construction put upon them by different officers, and as such construction might vary from time to time, the result would be to throw the proper meaning and effect of the rules into the utmost uncertainty and confusion.

If rules are legal in themselves, it is the duty of the officers to carry them out legally. The objects of the rule may be abused, in practice, but if in such case the abuse is the fault of individuals, it ought not to be viewed as affecting the rules themselves or the general purposes of the society to which they belong. If the printed rules are not the real rules of an association, and if a society under pretense of being a benevolent institution, is really a scheme in whole or in part designed for the support and encouragements of illegal strikes, the society must be deemed to be established for an illegal purpose."¹

Two important decisions in trades-union cases have recently been made in England² by *Chief Justice Coleridge* and the associate justices of the court of Queen's Bench that serve to define what, in law, constitutes "intimidation" in connection with "strikes." While there is no law against strikes as such, intimidation is held to be illegal and is indeed declared to be so by statute. Every workman has the right to "strike," and so far as the law is concerned he is the sole judge of the reasonableness of his action in the premises. But he has no right to intimidate; and the same law which will uphold him in his liberty to act in combination with others for the advancement of the interests of his trade will punish anything on his part that can be properly construed to be intimidation. What, then, is intimidation within the meaning of the law?

A coal merchant of Plymouth, with a large trade, especially in supplying steamers touching at that port, employed four gangs of hands to unload the colliers. Three of those gangs were composed of union men, and those who made up the fourth belonged to no union. The secretaries of the three unions came to the coal merchant and ordered him to dismiss his non-union men, under a threat that, in case of a failure to comply, they would withdraw the union workmen, and so leave him short-handed, in a way to cripple his business at a busy time. The coal merchant refused; a strike was ordered, and the union men went out.

The secretaries of the unions were immediately prosecuted under the statute forbidding intimidation, and the court found

¹*Farrer v. Olose*, L. R. 4 Q. B. 612.

²*Connor v. Kent* (1891) Week. Notes (English) 154.

them guilty on the ground that the threat which accompanied their demand amounted to intimidation. On appeal this decision was reversed, *Lord Coleridge* holding that a threat to notify the men to leave their work, unaccompanied by violence or any menace of violence, cannot be called intimidation within the English Conspiracy Act of 1875, 38 & 39 Vict. chap. 86, § 7, sub. 1, which makes it an offense for one to "use violence to or intimidate," etc., to compel another to do or abstain from doing an act which he has a legal right to abstain from or to do. Of course, the final decision would have been otherwise had there been any recourse to or threat of violence. It seems, therefore, that a threat, in order to sustain a legal charge of intimidation, under the English Conspiracy Act, must at least imply some act that would justify a magistrate in binding the offender over to keep the peace.

Another decision of the court below to the effect that a "strike which could have the effect of injuring an employer is illegal and indictable" was unhesitatingly reversed.

In the different states legislation has been had upon the subject of trade conspiracies and the rights of the employer and employé,

In Alabama, the Code of 1886, Vol. 2, part 5, title 2, § 3763. declares that any person who, by force or threats of violence to person or property, prevents or seeks to prevent another from doing work or furnishing materials, or from contracting to do work or furnish materials for or to any person engaged in any lawful business, or who disturbs, interferes with or prevents the peaceable exercise of any lawful industry, business or calling by any other person, must, on conviction, be fined not less than ten, nor more than five hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than twelve months. Under this Act any two or more persons conspiring together to violate the Statute, and doing some act to carry their agreement into effect, are each guilty of the offense of conspiracy.¹

The Colorado Acts 1887, page 58, §§ 1 and 2, forbid the "blacklisting" of employés, to prevent their securing other employment.

¹*State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79; *Cleveland v. State*, 84 Ala. 254; *Scully v. State*, 39 Ala. 240.

The Acts of 1889, page 92, § 1, declare that "it shall not be unlawful for any two or more persons to unite or combine or agree in any manner, to advise or encourage, by peaceable means, any person or persons to enter into any combination in relation to entering into or remaining in the employment of any person, persons or corporation, or in relation to the amount of wages or compensation to be paid for labor, or for the purpose of regulating the hours of labor, or for the purpose of procuring of fair just treatment from employers or for the purpose of aiding and protecting their welfare and interests in any other manner not in violation of the Constitution of this State or the laws made in pursuance thereof; provided, that this Act shall not be so construed as to permit two or more persons, by threats of either bodily or financial injury, or by any display of force, to prevent or intimidate any other person from continuing in such employment as he may see fit, or to boycott or intimidate any employer of labor."

The Connecticut General Statutes, 1888, § 1517, enacts that every person who shall unlawfully, maliciously and in violation of his duty or contract, unnecessarily stop, delay, or abandon any locomotive, car or train of cars, or shall maliciously injure, hinder, or obstruct the use of any locomotive, car or railroad, shall be fined not more than one hundred dollars or imprisoned not more than six months.

Chapter 99, § 1518, "Intimidation, Boycotting, etc." Every person who shall threaten or use any means to intimidate any person to compel such person against his will to do or abstain from doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure, or threaten to injure his property, with intent to intimidate him, shall be fined not more than one hundred dollars or imprisoned not more than six months. When to the intention is added the actual agreement to conspire, the offense is complete.¹

The Delaware Acts, 1877, chapter 481, are in substance:

§ 1. If any locomotive engineer engaged in a strike or to incite others to strike, or in furtherance of any combination or preconcerted arrangement with any person or persons to produce a strike,

¹*State v. Glidden*, 8 New Eng. Rep. 849, 55 Conn. 46. See *United States v. Donau*, 11 Blatchf. 168.

abandons his locomotive at any other place than its schedule or appointed destination, or refuse to proceed to such destination;

§ 2. If any locomotive engineer, to aid any strike on any other road, refuse or neglect to aid in the movement over the tracks of the company employing him, of the cars of such other railroad company, or received therefrom in course of transit where strikes are, either then, or may have been organized or attempted to be maintained;

§ 3. If any person in aid of any strike upon any railroad, shall interfere with, molest or obstruct any railroad employé engaged in the discharge of his duty;

§ 4. If any person in aid of a strike shall obstruct any railroad track or destroy the rolling stock or other property of any railroad company, or take possession of or remove or prevent the use thereof, or shall by offer of recompense induce an employé to leave the service of the railroad;

§ 5. If any conductor, baggage master, brakeman or other trainman, abandons his train in aid of or to incite a strike, or refuses to proceed to its destination,—in either case the person shall be guilty of a misdemeanor and fined not less than \$100, nor more than \$500, and imprisonment from six months to one year.

In Florida, McClellan's Digest, 1881, chap. 69, § 24, it is provided that if any person shall entice, induce or otherwise persuade any laborer or employé to quit the service of another to which he was bound by contract, before the expiration of the term of service stipulated in said contract, he shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding one thousand dollars.

The Georgia Code, 1882, Part IV., § 4498, is that: If any two or more persons shall associate themselves together in any society organization whatever, with intent and for the purpose of preventing, in any manner whatever, any person or persons whomsoever from apprenticing himself or themselves to learn and practice any trade, craft, or vocation or calling whatsoever, or for the purpose of inducing by persuasion, threats, fraud, or any other means, any apprentice or apprentices to any such trade, craft, or calling or vocation, to leave the employment of their employer or employers, or for the purpose by any means whatever, of preventing or

detering any person or persons whomsoever from learning and practicing any such trade, craft, vocation or calling whatsoever,—every such person so associating himself in such society or organization, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not to exceed one thousand dollars, imprisonment not to exceed six months, to work in the chain-gang on the public works or on such other works as the county authorities may employ the chain-gang, not exceeding twelve months.

Acts 1887, Act No. 347, page 107, § 1. : . . If any person or persons by threats, violence, intimidation or other unlawful means, shall prevent or attempt to prevent any person or persons in this State from remaining in or performing the business, labor or duties of any lawful employment or occupation; or if any person or persons, singly or together, or in combination, shall conspire to prevent or attempt to prevent any person or persons by threats, violence or intimidation from engaging in, remaining in, or performing the business, labor or duties of any lawful employment or occupation; or if any person or persons, singly or by conspiring together shall hinder any person or persons who desire to labor from so doing, or hinder any person by threats, violence or intimidation from being employed as laborer or employé, or by the means aforesaid shall hinder the owner, manager or proprietor for the time being from controlling, using, operating, or working any property in any lawful occupation, or shall by such means hinder such persons from hiring or employing laborers or employés, such person or persons so offending shall be deemed guilty of a misdemeanor and on conviction be punished as stated in section 4498.

The Illinois Annotated Statutes 1885, chapter 38, paragraph 73, as amended by Act June 16, 1887, p. 167, declare that if any two or more persons conspire or agree together, or the officers or executive committee of any society or organization or corporation shall issue or utter any circular or edict as the action of or instruction to its members, or any other persons, societies, or organizations or corporations for the purpose of establishing a so-called boycott or blacklist, or shall post or distribute any written or printed notice in any place, with the fraudulent or malicious

intent wrongfully and wickedly to injure the person, character, business, or employment or property of another . . . or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice, or to prevent competition in the letting of any contract by the State, or the authorities of any county, city, town or village, or to induce any person not to enter into such competition . . . they shall be deemed guilty of a conspiracy . . . and imprisoned in the penitentiary not exceeding five years or fined not exceeding \$2,000, or both.

Chapter 38, Intimidation of Employés, par. 206. If two or more persons shall combine for the purpose of depriving the owner or possessor of property of its lawful use and management, or by preventing by threats, suggestions of danger or any unlawful means, any person from being employed by or obtaining employment from any such owner or possessor of property on such terms as the parties may agree upon, such person shall be fined not exceeding \$500, or imprisonment not exceeding six months.

Par. 207. If any person shall by threats, intimidation or unlawful interference seek to prevent any other person from working or from obtaining work at any lawful business, on any terms that he may see fit, such person shall be fined not exceeding \$200.

Par. 208. Whosoever enters a coal bank, mine, shaft, manufactory, building or premises of another, with intent to commit an injury thereto, or by means of threats, intimidation or riotous or other unlawful doings, to cause any person employed therein to leave his employment, shall be fined not exceeding \$500 or confined not exceeding six months or both.

Par. 324. Whoever without authority of law and not being the owner or agent of adjoining lands, enters the coal bank, mine, shaft, manufactory or place where workmen are employed, of another, without the expressed or implied consent of the owner or manager thereof, after notice that such entry is forbidden, shall be fined not exceeding \$200, or confined not exceeding six months.

Par. 109. Strikes and conspiracies. If any locomotive engineer in furtherance of any combination or agreement, shall willfully and maliciously abandon his locomotive upon any railroad at any

other point than the regular schedule destination of such locomotive, he shall be fined not less than \$20 nor more than \$100, and confined in the county jail not less than 20 days nor more than ninety days.

Par. 110. If any person or persons shall willfully and maliciously by any act or by means of intimidation, impede or obstruct, except by due process of law, the regular operation and conduct of the business of any railroad company or other corporation, firm or individual in this State, or of the regular running of any locomotive engine, freight or passenger train of any such company, or the labor or business of any such corporation, firm or individual, he or they shall, on conviction thereof, be punished by a fine of not less than twenty dollars, nor more than two hundred dollars, and confined in the county jail not less than twenty days and not more than ninety days.

Par. 111. If two or more persons shall willfully and maliciously combine or conspire together to obstruct or impede by any act, or by means of intimidation, the regular operation and conduct of the business of any railroad company, or any other corporation, firm or individual in this State, or to impede, hinder or obstruct, except by due process of law, the regular running of any locomotive engine, freight or passenger train on any railroad, or the labor or business of any such corporation, firm or individual, such person shall, on conviction thereof, be punished by fine not less than twenty dollars, nor more than two hundred dollars, and confined in the county jail not less than twenty days, nor more than ninety days.

Par. 112. This Act shall not be construed to apply to persons voluntarily quitting the employment of any railroad company or such other corporation, firm or other individuals, whether by concert of action or otherwise, except as provided in paragraph 109.¹

The intimidation of employes is made a criminal offense in Indiana. § 2126. Whoever by threats, intimidation or force, prevents or seeks to prevent any person from doing work for or furnishing materials to any person, firm or corporation engaged in any lawful business, shall be fined not more than one hundred dollars,

¹Annotated Statutes, 1885, chapter 114.

nor less than twenty dollars, to which may be added imprisonment in the county jail not more than six months nor less than ten days.

§ 2127. Intimidation of employers. Whoever unlawfully, by threats, intimidation or force, prevents or attempts to prevent any railroad company or any of the agents, servants or employes thereof, from moving, running and operating the locomotives, cars and trains of such railroad company, or from transporting and carrying passengers or freight in its cars on the line of such railroad company, or, in like manner prevents or attempts to prevent any express company, common carrier, or persons engaged in transporting or carrying passengers or freight for hire, from so transporting or carrying either passengers or freight, shall be fined not more than one thousand dollars, nor less than fifty dollars, to which may be added imprisonment in the state prison not more than twenty-one years, nor less than two years, and such offender shall be disfranchised and rendered incapable of holding any office of trust or profit for any determinate period. ¹

§ 2193. Protection of employes as voters. Whoever for the purpose of influencing a voter . . . if an employer of laborers, or an agent of such employer, threatens to withhold the wages of or to dismiss from service any laborer in his employment; or refuses to allow to any such employe time to attend at the place of election and vote, shall be fined not more than one thousand dollars nor less than twenty dollars, imprisoned in the state prison not more than five years nor less than one year, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period.

Blacklisting is forbidden, and the cause of discharge must on demand be stated in writing, which shall not furnish a cause of action for slander or libel, and if not furnished in reasonable time after demand, no cause can thereafter be stated. ²

The Iowa statute authorizes the incorporation of trade unions.³

¹Rev. Stat. 1861.

²Elliott's Supplement, chapter 28, §§ 1615, 1616, 1617. For an example of the general statute against conspiracy, see *Landringham v. State*, 49 Ind. 186; *State v. McKinstry*, 50 Ind. 465; *State v. Boswell*, 2 West. Rep. 726, 104 Ind. 541.

³McClean's Anno. Stat. 1880, title. ix, chap. 2, § 1091, amended by chap. 71, Acts 1896.

The Acts 1886, chap. 20, provide for the arbitration of labor disputes.

The Acts 1888, chap. 57, for the prevention of black listing.

Kansas. The act of employes abandoning a railroad train is made criminal and conspiracy is an indictable offense.¹ Boards of Arbitration are provided for by the Act of 1886, chap. 28, §§ 1-10.

Kentucky Gen. Stat. 1881, chap. 29, art. 14, § 13, forbids the enticing of laborers from work.

In Louisiana the intimidation of crews of steamboats is forbidden;² as also the abandonment of steamboats by employes.

In Maine certain acts obstructing the business of certain corporations are declared unlawful.

§ 6. Any employé of a railroad corporation who, in pursuance of an agreement or combination by two or more persons, to do or procure to be done, any act in contemplation or furtherance of a dispute between such corporation and its employes, unlawfully or in violation of his duty or contract, stops or unnecessarily delays or abandons, or in any way injures a locomotive or any car or train of cars on the railway track of such corporation; or in any way hinders or obstructs the use of any locomotive, car or train of cars on the railroad of such corporation, shall be punished by fine not exceeding five hundred dollars, or imprisonment in the state prison or in jail not exceeding one year.

§ 7. Whoever by any unlawful act, or by any willful omission or neglect, obstructs or causes to be obstructed an engine or carriage on any railroad or railway, or aids or assists therein, or whoever having charge of any locomotive or carriage while upon or in use on any railway, of any railway, of any railroad corporation willfully stops, leaves or abandons the same, or renders or aids or assists in rendering the same unfit for or incapable of immediate use, with intent thereby to hinder, delay or in any manner to obstruct or injure the management of any railroad or railway, or the business of any corporation operating or owning the same, or of any other corporation or person, and whoever aids, or assists therein, shall be punished by fine not exceeding one thousand dol-

¹Compiled Laws 1885, chap. 21, §§ 2213, 2214, 2215, 2216; *State v. Searcy*, 48 Iowa, 562; *State v. Stevens*, 80 Iowa, 391; *State v. Potter*, 28 Iowa, 554; *State v. Flynn*, 28 Iowa, 26.

²Voorhies Revised Laws 1870, § 944.

lars, or imprisonment in the state prison or in jail not exceeding two years.

§ 8. Whoever, having any management of, or control, either alone or with others, over any railroad, locomotive, car or train, while it is used for the carriage of persons or property, or is at any time guilty of gross carelessness or neglect on or in relation to the management or control thereof; or maliciously stops or delays the same in violation of the rules and regulations then in force for the operation thereof; or abstracts therefrom the tools or appliances pertaining thereto; with intent thereby maliciously to delay the same, shall be punished by a fine not exceeding one thousand dollars or imprisonment in the state prison or in jail not exceeding three years.

§ 9. Whoever, alone or in pursuance or furtherance of any agreement or combination with others, to do or to procure to be done any act in contemplation or furtherance of a dispute or controversy between a gas, telegraph or railroad corporation and its employés or workmen, wrongfully and without legal authority uses violence towards, or intimidates any person in any way or by any means, with intent thereby to compel such person against his will to do, or abstain from doing, any act which he has a legal right to do or abstain from doing; or on the premises of such corporation, by bribery or in any manner or by any means, induces or endeavors or attempts to induce such person to leave the employment and service of such corporation, with intent thereby to further the objects of such combination or agreement; or in any way interferes with such person while in the performance of his duty; or threatens or persistently follows such person in a disorderly manner, or injures or threatens to injure his property, with either of said intent, shall be punished by fine not exceeding three hundred dollars or imprisonment not exceeding three months.

§ 10. Any person in the employment of a railroad corporation, who, in furtherance of the interest of either party to a dispute between another railroad corporation and its employés, refuses to aid in moving the cars of such other corporation or trains in whole or in part made up of the cars of such other corporation, over the tracks of corporation employing him; or refuses to aid in loading or discharging such cars, in violation of his duty as such employé,

shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the state prison or in jail not exceeding one year.¹

On the subject of conspiracy it is, by chap. 126, § 18, enacted that: If two or more persons conspire and agree together, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business, or property of another; or to do any illegal act injurious to the public trade . . . they are guilty of a conspiracy, and every such offender, and every person convicted of conspiracy at common law, shall be punished by imprisonment for not more than three years, or by fine not exceeding one thousand dollars.

Intimidation of Employés.—Whoever, by threats, intimidation, or force, alone or in combination with others, prevents any person from entering into or continuing in the employment of any person, firm or corporation, shall be punished by imprisonment not more than two years, or by fine not exceeding five hundred dollars.²

In Maryland, under the title of "Conspiracy," it is enacted that: An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as an offense; nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or any offense against any person or against property.³ Provision is also made for a board of arbitration.⁴

In Massachusetts a like board of arbitration is established,⁵ and the incorporation of labor unions is also authorized.⁶ In 1890-91 the Legislature passed a law known as the Weavers' Fine Bill. The Act provides a penalty for a manufacturer who shall impose a fine or other punishment upon a workman for an imperfection

¹ Rev. Stat. 1888, chap. 128, §§ 6-10.

² Acts 1889, chap. 808. See on the subject of conspiracy, *State v. Clary*, 64 Me. 370; *State v. Mayberry*, 48 Me. 235; *State v. Roberts*, 84 Me. 321; *State v. Ripley*, 31 Me. 388; *State v. Bartlett*, 30 Me. 135; *State v. Murry*, 15 Me. 102.

³ Code Pub. Gen. Laws 1888, art. 27, § 81.

⁴ Code of Pub. Gen. Laws 1888, art. 7, §§ 1-5.

⁵ Acts 1886, chap. 263, §§ 1-9.

⁶ Acts 1888, chap. 134, §§ 1-4.

in weaving, and one Josiah Perry, a Worcester County manufacturer, has been convicted under the Act, and on appeal an attack is made before the Supreme Court of the State on the constitutionality of the legislation. It is said in argument that there is no authority which the people of Massachusetts have conferred upon the Legislature to prescribe by law what prices shall be paid for labor where parties competent to contract make contracts for its performance and for the price to be paid for it. The Legislature cannot fix by law the amount which an employé shall be entitled to receive. Neither is there any power given to the Legislature to require by law that poor services shall receive the same compensation as that which is better and therefore worth more.

These positions, as abstract propositions, are undoubtedly true. But the precise question to be determined is whether the Legislature has the constitutional right to decide that citizens of the State shall not make a contract, which involves the possibility of a reduction in wages for imperfection in the product, whether caused by faulty machinery or otherwise. Whether such a law is wise or not is not in the issue. The court is called upon to decide whether the Legislature cannot enact such a law. The appeal is still pending in the court.

In Michigan the intimidation of employés is forbidden, in section 9274, and under the heading "Obstructing or Conspiring to Obstruct Business of Corporations," it is provided, § 9274, that: If any person or persons shall willfully or maliciously, by any act or by means of intimidation, impede or obstruct, except by due process of law, the regular operation or conduct of the business of any railroad company or other corporation, firm or individual in this State, or of the regular running of any locomotive engine, freight or passenger train of any such company, or the labor or business of any such corporation, firm or individual, he or they shall, upon conviction thereof, be punished by imprisonment in the county jail not more than three months or in the state prison not exceeding one year.

§ 9275. If two or more persons shall willfully or maliciously combine or conspire together to obstruct or impede, by any act or by means of intimidation, the regular operation and conduct of the business of any railroad company or any other corporation,

firm or individual in this State, or to impede, hinder, or obstruct, except by due process of law, the regular running of any locomotive engine, freight or passenger trains on any railroad, or the labor and business of any such corporation, firm or individual, such person shall, on conviction thereof, be punished by imprisonment in the county jail for a period not more than three months, or in the state prison for a period not exceeding two years.

This statute does not require that malice must be shown to have existed against the owner of the business disturbed or against his property, in the sense that the common law requires it in cases of malicious mischief.¹ If the indictment only charges a conspiracy to do certain acts, describing them, but does not charge the doing of any of the acts, it only charges the offense of conspiracy under this section.

§ 9276. It is declared that this Act shall not be construed to apply to cases of persons voluntarily quitting the employment of any railroad company or such other corporation, firm, or individual, whether by concert of action or otherwise.²

The organization of trade unions is authorized.³

In Missouri a party engaging in a criminal conspiracy is guilty of a misdemeanor.⁴ Arbitration boards are authorized by chapter 95, art. 2, §§ 6354-6358.

In Minnesota, under the title "Conspiracy," it is provided, § 138, that if two or more persons conspire either . . . (5.) To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering, or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or (6.) To commit any act injurious to the public health, to the public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws, each of them is guilty of a misdemeanor.

¹ *People v. Petheram*, 7 West. Rep. 592, 64 Mich. 252.

² Howell Anno. Stat. 1882, chap. 321, §§ 9274-9276.

³ Howell Anno. Stat. 1882, chap. 17, § 3945; Of Knights of Labor, Acts 1883, No. 159, §§ 1-6; Of Labor Associations, Acts 1885, No. 145, §§ 1-9, and of Boards of Arbitration, Acts of 1896, No. 298, §§ 1-9.

⁴ *State v. Daubert*, 42 Mo. 242; *State v. Ross*, 29 Mo. 82; Rev. Stat. 1889, chap. 47, art. 7, § 3788.

§ 139. No conspiracy is punishable criminally unless it is one of those enumerated in the last section, and the orderly and peaceably assembling or co-operation of persons employed in any calling, trade, or handicraft, for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate, is not conspiracy.

§ 140. No agreement except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act besides such agreement be done to effect the object thereof by one or more of the parties to such agreement.¹ The statute also declares coercion to be a crime.²

In Montana unlawful interference between employer and employé is defined and forbidden.³ A board of arbitration is also provided for.⁴

In New Hampshire interference with the laborer or employé is forbidden.⁵

In New Jersey, title "Conspiracy," it is enacted that if two or more persons shall combine, unite, confederate, conspire or bind themselves by oath, covenant, agreement or other alliance to commit any crime . . . or to cheat and defraud any person of any property by any means which are in themselves criminal, or to cheat and defraud any person of any property by any means which, if executed, would amount to a cheat . . . or to commit any act for the perversion or obstruction of justice, or the due administration of the laws, they shall, on conviction, be deemed guilty of a conspiracy, and shall be punished by imprisonment at hard labor not exceeding two years, or by a fine not exceeding five hundred dollars, or both; but no agreement to commit any crime other than murder, manslaughter, sodomy, rape, arson, burglary or robbery, shall be deemed a conspiracy, unless some act in execution of such agreement be done to effect the object thereof by one or more of the parties to such agreement, provided that nothing in the section shall be construed to apply to any

¹Penal Code, 1886, p. 52.

²Section 490, p. 189. See same title in New York statute.

³Comp. Stat. 1887, Fourth Division Criminal Laws, chap. 13, §§ 252-254.

⁴Comp. Stat. 1887, Division 5, General Laws, chap. 7, §§ 82-87

⁵Acts 1887, chap. 54, § 1.

person or persons lawfully and by peaceful means persuading, advising or encouraging other persons to enter into any combination for or against leaving or entering into the employment of other persons.¹

It shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath covenant, agreement, alliance, or otherwise to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, persons or corporation.²

It is not unlawful, since New Jersey Act 1883 (Sup. Rev. p. 774), for the members of a voluntary association to combine for the purpose of securing the control of the work connected with their trade, and to endeavor to effect such purpose by peaceable means.³

The Revised Statutes of 1877, p. 946, §§ 173-176, make it a criminal offense for an employé to abandon a railroad train before it reaches its destination. Boards of Arbitration are provided for in the Supplement of 1886, p. 21, §§ 1-13.

Under the legislation in force at the date of the decisions, the combination or agreement must be followed by some act done to effect the object by one or more of the parties to the agreement.⁴

The legislation in New York is to the effect, under the title of "Conspiracy," section 168, that if two or more persons conspire either . . . (5) To prevent another from exercising a lawful trade, or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or (6) To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws, each of them is guilty of a misdemeanor.

¹Rev. Stat. 1877, p. 261, § 191, as amended by § 9, p. 1296; Rev. Stat. 1877, and by § 43, p. 199, sup'lt. 1886.

²Sup. 1883, p. 774, § 30.

³*Mayer v. Journeymen Stone-Outters Assn.* 47 N. J. Eq. 519.

⁴*State v. Young*, 87 N. J. L. 184; *State v. Donaldson*, 82 N. J. L. 151; *Johnson v. State*, 26 N. J. L. 818; *State v. Norton*, 23 N. J. L. 83; *Den v. Johnson*, 18 N. J. L. 90; *State v. Rickey*, 9 N. J. L. 364.

§ 170. . . . The orderly and peaceable assembling or co-operation of persons employed in any calling, trade, or handicraft, for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such a rate, is not conspiracy.

§ 171a. (As enacted by chap. 688, Acts of 1887.) Any person or persons, employer or employers of labor, and any person or persons of any corporation or corporations, in behalf of such corporation or corporations, who shall hereafter coerce or compel any person or persons, employé or employées, laborer or mechanic, to enter into an agreement, either written or verbal from such person, persons, employé, laborer or mechanic, not to join or become a member of any labor organization, as a condition of such person or persons securing employment, or continuing in the employment of any such person or persons, employer or employers, corporation or corporations, shall be deemed guilty of a misdemeanor. The penalty of such misdemeanor shall be imprisonment in a penal institution for not more than six months or by a fine of not more than two hundred dollars or by both such fine and imprisonment. ¹

A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do, or to abstain from doing, wrongfully and unlawfully . . . (2) deprives any such person of any tool, implement or clothing or hinders him in the use thereof, or (3) uses or attempts the intimidation of such person by threats or force, is guilty of a misdemeanor. ²

Endangering life by refusal to labor. A person who willfully and maliciously either alone or in combination with others, breaks a contract of service or hiring, knowingly or having reasonable cause to believe that the probable consequences of his so doing will be to endanger human life or to cause grievous bodily injury is guilty of a misdemeanor. ³

A person who willfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which

¹ Rev. Stat. 1888, Penal Code, § 168, 170, 171a, enacted by chap. 688, Acts 1887.

² Rev. Stat. 1888, p. 141, § 658.

³ Rev. Stat. 1888, p. 146, § 678.

openly outrages public decency, for which no other punishment is expressly prescribed by this code, is guilty of a misdemeanor, but nothing in this code contained shall be so construed as to prevent any person from demanding an increase of wages or from assembling and using all lawful means to induce employers to pay such wages to all persons employed by them, as shall be a just and fair compensation for services rendered.¹

The manufacture of clothing is one of the largest industries of many that are carried on in the city of Rochester, New York. According to the report of the Board of Arbitration, the annual output of ready-made clothing reaches \$10,000,000 in value, the annual aggregate of wages is \$3,000,000, and the employés, men, women, and children, including about 5,000 families, number about 20,000, or about one seventh the entire population of the city. Early in March, 1891, this great industry came to a standstill through the combined action of twenty-one manufacturing firms in dismissing the cutters in their employ, about 350 in all. All of the dismissed men were members of a local assembly of Knights of Labor, and the reason which their employers gave for their course was that they were unable to continue their business because of the insistence, on the part of the national organization of the Knights, on the right to dictate to the employers the terms upon which the local Knights should be employed. The sudden arrest of a great industry produced the results inevitable in such cases. There was destitution and suffering in thousands of families, and the industrial and commercial life of the city received a violent shock. Indictments were found against officers of the national organization of the Knights of Labor, and a conviction was had, and the appeal is now pending before the general term of the supreme court at Buffalo under the title of the *People v. Hughes*. The decision will be looked for with interest. The

¹ Rev. Stat. 1888, p. 146, § 673; State Board of Mediation and Arbitration. Established Acts 1887, chap. 68. See also the decisions of the New York courts: *March v. People*, 7 Barb. 393; *People v. Chase*, 16 Barb. 495; *Pepper v. Haight*, 20 Barb. 438; *Adams v. People*, 9 Hun. 89; *Hooker v. Vandewater*, 4 Denio, 353; *Master Stevedores Assn. v. Walsh*, 2 Daly, 1; *People v. Trequier*, 1 Wheel. Cas. 142; *People v. Seaman*, 5 Denio, 413; *People v. Fisher*, 14 Wend. 15; *People v. Underwood*, 16 Wend. 546; *Priest v. Cummings*, 20 Wend. 353; *Hamilton v. Wright*, 37 N. Y. 508; *Stokes v. People*, 53 N. Y. 179; *People v. Brady*, 56 N. Y. 190; *People v. Powell*, 63 N. Y. 88. See also *post*, § 76.

State Board of Arbitration, during the pending difficulty, put in an appearance and made unavailing efforts to harmonize the differences between the manufacturers and employés. It then began an investigation into the cause of the trouble, sitting for three days and going into the subject with great thoroughness. It made a report as follows:

OFFICE OF THE
BOARD OF MEDIATION AND ARBITRATION, }
ALBANY, March 24, 1891. }

To the Legislature:

On Saturday, the 7th instant, twenty-one individual, firm, and corporation manufacturers of clothing, who constitute the Clothiers' Exchange of the city of Rochester, dismissed the cutters in their employ, who number about 350, and are organized in a local assembly of the Knights of Labor, which has relations with a national organization of that order. The manufacture of clothing is the most extensive of the many industries carried on in Rochester, which is now the largest interior city of the State, with a growth in population from 90,000 in 1880 to 140,000 in 1890. The annual volume of the out-put of ready-made clothing reaches \$10,000,000 in value, and the annual wages paid aggregate \$3,000,000, distributed among the working members, men, women and children, of about 5,000 families, numbering about 20,000 persons, or nearly fifteen per cent of the inhabitants. As the Clothiers' Exchange embraces the principal manufacturers in the city, and as the closing of the cutting departments causes a cessation of work all along the line, it is easy to see, from the figures given, the local importance that attaches to the lockout.

There are some features of the revelations made by the investigation, and of the present situation, of such general concern as not to be unworthy of the attention of the Legislature. By the law of its creation, this board is required, in making report to the Legislature, to offer "such suggestions as to legislation as may seem to it conducive to harmonizing the relations of, and disputes between employers and the wage-earning masses, and the improvement of the present system of production." The board is of opinion that the measure of coercion of employers by employés, popularly known as the "boycott," as its workings are developed

in this case, does not conduce to harmony between the parties, and is not calculated to improve their present or any other system of production. On the contrary, it would seem that, sooner or later, the consequence must be disruption of relations and destruction of industries. Like causes produce like effects, and the spectacle presented in Rochester to-day may be witnessed in the other industrial centers of the State to-morrow. It is clearly the province of all persons who choose to do so, to combine their skill and labor, put a price upon their use, and sell that use to whomsoever they please, or hold it in idleness as they please. But it is as clearly not the right of any person, upon failure of negotiations of a satisfactory sale of the use of their skill and labor to others persons who desire such use, to engage in an attempt at avowed destruction of the business of those other persons because they refuse to accede to terms and conditions demanded of and not agreeable to them, and then make traffic of desistance. It is suggested that, in so far as the laws of the State of New York fail to protect employers and employes alike in their prerogative of equal right to buy or sell the use of skill and labor, they are deficient and at fault as not "conducive to harmonizing the relations of, and disputes between, employers and wage-earning masses," or to the "improvement of the present system of production," and should be amended to those most desirable ends set forth by the Legislature itself in the Act quoted.

All of which is respectfully submitted.

WILLIAM PURCELL,
GILBERT ROBERTSON, JR.,
F. F. DONOVAN,

State Board of Mediation and Arbitration.

CHARLES J. MADDEN, Secretary.

It is to be hoped that the action of the state Legislature upon this report may prove conducive to the settlement of disputes between employers and employes without resort to lockouts or strikes.

In North Carolina a conspiracy against the state government is declared an indictable offense.¹ It is also made an offense to conspire to abduct minors.²

¹*State v. Jackson*, 82 N. C. 565.

²*State v. Sullivan*, 85 N. C. 506.

In North Dakota the intimidation of the employer or employé is made criminal.¹ Preventing persons from obtaining employment or enjoying employment already obtained is also declared criminal.² Black lists of employés who have left the service of a corporation or have been discharged is also forbidden to be exchanged between corporations.³

In Ohio, voluntary boards of arbitration are authorized.⁴

An interesting decision has been rendered by the United States Circuit Court of the Southern District of Ohio.⁵

A suit for an injunction was brought by Lewis E. Casey, editor and proprietor of *The Covington (Ky.) Commonwealth*, to restrain Typographical Union No. 3 of Cincinnati from boycotting the complainant and his newspaper. The complaint alleges that the said union demanded of the proprietor of *The Commonwealth* that he should conduct his paper according to the customs, rules and regulations adopted by that organization; that he should pay his employés such rates as the union might from time to time prescribe, and that he should discharge from his employment all persons who were not members of it. Upon his refusal to comply with these demands the defendants, it is averred, illegally and with intent to injure the complainant and to destroy the circulation of his newspaper and its value as an advertising medium, caused to be printed and posted in conspicuous places large handbills calling upon all persons to withdraw their patronage from *The Commonwealth*; that they issued circulars to its advertising patrons requesting them to cease advertising and threatening, in case of their refusal, that they would be visited by the ill-will and incur the enmity of all organized labor. Circulars were also sent to news agents handling the complainant's paper stating that if they continued to sell it they would be exposed to the hostility of the labor organizations.

The defendants filed no answer, but upon the argument of the motion for an injunction submitted several affidavits, in which they acknowledged making the demands and having sent the cir-

¹Revised Codes Dakota, 1888; Penal Code, chap. 57, §§ 783, 784.

²Constitution 1890, art. 1, § 23.

³Constitution 1890, art. 17, § 212.

⁴Act Feb. 10, 1885, §§ 1-18; Rev. Stat. 1886, vol. 3, p. 425.

⁵*Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. Rep. 185.

culars and posted the handbills referred to by the complainant, but denied that they made any threats or menaces, or that such circulars and handbills were intended to express any threats or to interfere with the business of the complainant. They affirmed that these notices were only designed to represent to the parties addressed the reason why they should give their patronage to members of Typographical Union No. 3 and to employers who were friendly to that organization and like unions of organized labor. Such substantially was the issue made up before the court and upon it the defendants' counsel maintained, first, that the complainant was not entitled to an injunction from a court of equity, but must seek a remedy by civil action or an indictment in the criminal courts; and second, that the defendants in all they did were simply pursuing a course of lawful competition.

The opinion delivered by *Justice Sage* is an elaborate review of the present state of law upon the subject of illegal trade combinations and conspiracies.

After the presentation of the facts upon the hearing of the motion, the court called upon counsel for the defendants to state the grounds of their objections to the granting of an injunction. They first challenged the jurisdiction in equity, citing several cases.¹

Kidd v. Horry, 28 Fed. Rep. 773, was an application to restrain the defendant by injunction from publishing certain circulars alleged to be libelous and injurious to complainants' patent-rights and business, and from making and uttering libelous and slanderous statements concerning the validity of complainants' letters-patent or their title thereto, or concerning their business, during the pendency of a suit to restrain the infringement of said patents. *Justice Bradley*, who decided the case, in the course of his opinion said that the application rested principally upon a line of recent English authorities, which depended on certain acts of Parliament, and not on the general principles of equity jurisprudence, but that neither the statute law of this country, nor the

¹*Kidd v. Horry*, 28 Fed. Rep. 773; *New York J. G. Soc. v. Roosevelt*, 7 Daly, 188, 190; *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. 142; *Richter v. Journeymen Tailors Union*, 24 Week. L. Bull. 189; *Mayer v. Journeymen Stonecutters Asso.* 47 N. J. Eq. 519; *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476, and *Moores v. Bricklayers Union, No. 1*, 23 Week. L. Bull. 48.

well considered judgment of a court, had introduced this new branch of equity into our jurisprudence. "There may be a case or two looking that way, but none that we deem of sufficient authority to justify us in assuming the jurisdiction. . . . We do not think that the existence of malice in publishing a libel, or uttering slanderous words, can make any difference in the jurisdiction of the court. Malice is charged in almost every case of libel, and no cases of authority can be found, we think, independent of statutes, in which the power to issue an injunction to restrain a libel or slanderous words has ever been maintained, whether malice was charged or not."

This case was approved and followed in *Baltimore Wheel Co. v. Bemis*, 29 Fed. Rep. 95, by Judges Colt and Carpenter, in the United States Circuit Court of Massachusetts.¹

Mr. Justice Gray was then the Chief Justice of the Supreme Court of Massachusetts, and pronounced the opinion, holding that "the jurisdiction of a court of chancery does not extend to cases of libel or of slander or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involves no breach of trust or of contract." Upon the authority of this case, and of *Prudential Assur. Co. v. Knott*, the Supreme Court of Massachusetts held in *Whitehead v. Kitson*, 119 Mass. 484, that there was no jurisdiction in equity to restrain a person falsely representing that the plaintiff's patent infringed a patent owned by himself, and thereby deterring others from purchasing the plaintiff's invention.

The case in *7 Daly* was upon a motion to vacate a preliminary injunction, which had been granted, restraining the defendants, as members or visitors of the State Board of Charities, from publishing the proceedings before them in their inspection and examination, under the statute, of the affairs and conduct of the complainant and its officers, which proceedings, it was averred, were secret and *ex parte*, the society having been excluded from being present by counsel, and not allowed to cross-examine witnesses or produce testimony on its own behalf, or to know even, except from the publications of the proceedings, what charges were made against it or its officers. The court held that, conceding the facts

¹To the same effect see *Boston Diatite Co. v. Florence Mfg. Co.* 114 Mass. 69.

as stated, and that the matter published was defamatory and libelous, the defendants could not be restrained by a court of equity, and that those injured must seek their remedy by a civil action, or by an indictment in the criminal courts; the exercise of an equitable jurisdiction to restrain publications being repugnant to the constitutional provision that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and that no law should be passed to restrain the liberty of speech and of the press.

In *Prudential Assur. Co. v. Knott* the court was asked to restrain the publication of a pamphlet which, it was charged, contained false statements of the rates of premium charged by complainant, and represented the company as being managed with reckless extravagance, and as being in a state of insolvency, and unable to fulfill its engagements; and it was averred that the continued publication would be very injurious to the company's credit, and could not fail greatly to damage its business and diminish its profits. Hall, V. C., refused to grant an injunction, and the plaintiff, by way of appeal, applied to Lord Cairns, L. C., who held that there was no ground whatever for the interference of the court; that if the publications did not amount to libels, and were therefore innocuous and justifiable in the eye of the court of common law, he was at a loss to understand upon what principle the court of chancery could interfere; and if, on the other hand, the comments were libelous, it was clearly settled that the court of chancery had no jurisdiction to restrain their publication.

In *Richter v. Journeymen Tailors Union*, a similar rule was applied. In that case the petition set forth that the defendant unlawfully combined and conspired to break up and destroy plaintiff's business, and that in order to accomplish that purpose they maliciously compelled plaintiff's employes to quit working for him and prevented others from working for him. The means by which this was accomplished were not specified. "Whether it was done by moral suasion, by argument, by reason, or by intimidation and violence, is not shown by either the petition or the evidence." All that did appear was that the defendants printed and published circulars, and that the plaintiff had lost customers because the latter had heard that plaintiff was employing scab

or inferior tailors. It was not shown from what source the alienated customers derived their information, but it was assumed by counsel for the plaintiff that it was from the circulars. The court held that the only question before it was whether it could enjoin the publication of a libel, and that the only remedy against such publication was at law. To the same effect is *Mayer v. Journeymen Stone-Cutters Asso.* Indeed, the law as stated in all these cases is so thoroughly established as to be beyond controversy, and it is not necessary to refer more particularly to other cases cited in support of it. *Francis v. Flinn*, 118 U. S. 385, 30 L. ed. 165, is quite as strong an authority as any cited.

But the question is whether *Casey v. Cincinnati Typographical Union*, falls within the rule. That the defendant, the Typographical Union, set on foot a boycott against the complainant, as stated in the bill, and in the affidavits on file, is not denied. That this boycott was to be enforced by threatening loss of business to those who, having no connection with the Union, should continue to advertise with, or in any way patronize, the complainant, is clearly shown. True, it is claimed that no threats were used; but the language of the circulars has no doubtful meaning. The affidavits on file show that it was perfectly understood by those who received them; and the circumstances indicate that it was intended that it should be so understood. In *Brace v. Evans* (Pa.) 13 Ry. & Corp. L. J. 561, it was held that the word "boycott" is in itself a threat. "In popular acceptance it is an organized effort to exclude a person from business relations with others, by persuasion, intimidation and other acts which tend to violence, and thereby coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs." But it is insisted for the defendants that every representation of fact contained in their hand-bills and circulars is true; that is to say, that the complainant had, in 1888, broken with the Typographical Union, discharged all union employés, and had since that date employed only those who were not members of the Union; and that after repeatedly promising to unionize his office he had finally, in September, 1890, refused to do so, and declared that he would not employ any person who was connected with the Union. All these are conceded facts. Therefore, argue counsel for the

defendants, this is only a case of lawful competition. The complainant having declared that he would not employ any member of the Union, the Union had a right to say that its members would not patronize the complainant. Nobody disputes that proposition. If that were all that is involved in this case, there would be nothing for the court to act upon. But it is not all by any means. Instead of "fair, although sharp and bitter, competition," as is contended by counsel, it was an attempt, by coercion, to destroy all competition affecting the Union. It was an organized conspiracy to force the complainant to yield his right to select his own workmen, and submit himself to the control of the Union, and allow it to regulate prices for him, and to determine whom he should employ and whom discharge. In other words, it was and is an organized effort to force printers to come into the Union, or be driven from their calling for want of employment, and to make the destruction of the complainant's business the penalty for his refusing to surrender to the Union. Whatever moral obligation may have been incurred by complainant by reason of his promises to unionize his office, they were wholly without consideration, and they amount to nothing whatever in law or in equity.

No case has been cited where, upon a proper showing of facts, an unsuccessful appeal has been made to a court of chancery to restrain a boycott. The authorities are all the other way. At common law an agreement to control the will of employers by improper molestation was an illegal conspiracy. In New York it has been held that the "boycott" is a conspiracy in restraint of trade.¹ So also in Virginia.² And in Connecticut.³ And in England.⁴

In *Emack v. Kane*, 34 Fed. Rep. 47, the United States Circuit Court for the Northern District of Illinois held that equity had jurisdiction to restrain an attempted intimidation by one issuing circulars threatening to bring suits for infringement against persons dealing in a competitor's patented article, the bill charging,

¹*People v. Wilsig*, 4 N. Y. Crim. Rep. 408; *People v. Kostka*, 4 N. Y. Crim. Rep. 429.

²*Com. v. Shelton*, 11 Va. L. J. 824.

³*State v. Glidden*, 8 New Eng. Rep. 849, 55 Conn. 46.

⁴*Reg. v. Barrett*, 18 L. J. 430.

and the proof showing, that the charges of infringement were not made in good faith, but with malicious intent to injure complainant's business. Judge Blodgett recognized, in his decision, the authority of *Kidd v. Horry*, and *Baltimore Wheel Co. v. Bemis*, 29 Fed. Rep. 95, cited for the defendants in this case, but said that the case before him was fairly different and distinguishable from those cases in a material and vital feature. In those cases the interference of the court was sought to restrain the publication of libelous attacks upon the property of the complainant. In *Emack v. Kane*, 34 Fed. Rep. 47, the gist of the complaint was that the publications were only means employed to carry into effect a malicious intent to injure and destroy the complainant's business. Judge Blodgett said: "I cannot believe that a man is remediless against persistent and continued attacks upon his business, such as have been perpetrated by these defendants against the complainant, as shown by the proofs in this case. It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this by one man upon another's property rights. If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law, in most cases, would do no good, and ruin would be accomplished before an adjudication would be reached. True, it may be said that the injured party has a remedy at law; but that might imply a multiplicity of suits, which equity often interposes to relieve from. But the still more cogent reason seems to be that a court of equity can, by its writ of injunction, restrain a wrong-doer, and thus prevent injuries which could not be fully redressed by a verdict and judgment for damages at law. Redress for a mere personal slander or libel may perhaps properly be left to the courts of law, because no falsehood, however gross and malicious, can wholly destroy a man's reputation with those who know him; but statements and charges intended to frighten away a man's customers, and intimidate them from dealing with him, may wholly break up and ruin him financially with no adequate remedy if a court of equity cannot afford protection by its restraining writ."

This is a clear and forcible statement of the law, and is in accord with the general current of authority.

How strongly it applies in this case may be readily seen by referring to the editorials in the Bulletin, the organ of the union, and to the hand-bills and circulars set forth in the statement of facts. The editorial in the Bulletin of December 1 declares that the boycott "is still on, and will be until the proprietor of the 'rat' sheet employs union men." It requests "all K. of L. assemblies, unions and workingmen to bear in mind that Mr. Casey refused to employ or in any way recognize organized labor." It asks their aid in compelling complainant to recognize the rights of labor by withdrawing their patronage from his paper, and if possible let him know why. It calls upon them not to patronize any merchants who advertise in complainant's newspaper, and if they see the paper in any place of business to refuse to buy goods unless the merchant immediately stops the "rat" sheet. The communication sent by the union on the 3d of November to Messrs. Griffin, agents for the sale of complainant's paper, contains the following:

"This union will consider it a great favor for you to give up the agency of The Commonwealth. If you do not do so, we will have to consider you the enemy of organized labor."

These are fair samples, and they indicate the method by which the boycott was to be made effective. Yet counsel say that there were no threats; that the defendants were only exercising their constitutional right to freely speak and publish their opinions; that what defendants have done is a necessary and natural and proper incident of bitter, but yet lawful, competition, and that this was only fair argument and persuasion. These propositions are in direct conflict with decisions made long ago, and recognized in all subsequent cases. In *Rex v. Eccles*, 1 Leach, 274, the defendants were indicted for conspiring to impoverish a tailor, and by direct means to prevent him from carrying on his trade. They were convicted, and upon a motion in arrest of judgment it was objected that the indictment ought to have stated the acts that were committed to impoverish the tailor and to prevent him from carrying on his trade in order that the defendants might thereby have notice of the particular charges they were called upon to answer. But *Lord Mansfield*, without hearing the prosecution, said that that was certainly not necessary. "The offense

does not consist in doing the acts by which the mischief is effected,—for they may be perfectly indifferent,—but the conspiring with a view to effect the intended mischief by any means. The illegal combination is the gist of the offense.” See also *Re Wabash R. Co.* 24 Fed. Rep. 217. In that case the following notice was sent to various foremen of the shops of the railroad company, during a strike organized to resist a reduction of wages, the railroad company being at that time in the hands of a receiver appointed by the United States circuit court:

“OFFICE OF LOCAL COMMITTEE,

“June 17, 1885.

“——, *Foreman*: You are requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employés. But in no case are you to consider this an intimidation.

“Held, that this was an unlawful interference with the management of the road by the receiver, and a contempt of court, for which the writer should be punished.”

The court, in passing upon the case, said: “The statement in all these notices that they are not to be taken as intimidation goes to show beyond a doubt that the writer knew he was violating the law, and by this subterfuge sought to escape its penalty.”

In *United States v. Kane*, 23 Fed. Rep. 748, *Judge* Brewer, after stating that “every man has a right to work for whom he pleases, and go where he pleases, provided in so doing he does not trespass on the rights of others,” by way of illustrating what is a threat, supposes that one of two workmen is discharged. The other is satisfied with his employment and wishes to stay. The discharged workman comes with a large party of his friends, armed with revolvers and muskets, and says: “Now my friends are here—you better leave—I request you to leave.” In terms there is no threat, but it is a request, backed by a demonstration of force, intended and calculated to intimidate, and the man leaves really because he is intimidated. Again, armed robbers stop a coach. One of their number politely requests the passengers to step out and hand over their valuables, and they do so. To the charge of robbery the defense is made that there was no violence; there were no threats; there was only a polite request,

which was complied with. The court said that any judge who would recognize such a defense deserved to be despised, and the court was right.

In *State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 46, cited hereinbefore, Judge Carpenter, speaking for the Supreme Court of Connecticut, states that the defendants said in effect to the publishing company: "You shall discharge men you have in your employ, and you shall hereafter employ only such men as we shall name. It is true, we have no interest in your business; we have no capital invested therein; we are in no wise responsible for its losses or failure; we are not directly benefited by its success; and we do not participate in its profits—yet we have a right to control its management, and compel you to submit to our dictation."

The court said that the bare assertion of such a right was startling; that, if it existed, all business enterprises were alike subject to the dictation and control of those who asserted it, and upon the same principle and for the same reason the right to determine what business men shall engage in, and when and where and how it shall be carried on, will be demanded, and must be conceded to associations of workingmen of the class of those whom it would be necessary to employ. The opinion in this case, although the case itself arose upon an indictment for conspiracy, is a well considered discussion of the law with relation to boycotting. All associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular terms upon which their business shall be conducted, by means of threats, or by interference with their property or traffic, or with their lawful employment of other persons, are *pro tanto* illegal combinations or associations.¹

A letter written by a "chairman" of an organized body to an employé in a shop that he might remain in it to do a particular

¹*Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48; *Johnston Harvester Co. v. Meinhardt*, 60 How. Pr. 168; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 116, 21 L. ed. 894, 421; *Tarleton v. M'Gawley*, Peake, *205; *Rafael v. Verelst*, 2 W. Bl. 1055; *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 337; *Gregory v. Brunswick*, 6 Man. & G. 205; *Gunter v. Astor*, 4 Moore, 12. See Greenhood, Pub. Pol. 648, 653.

kind of work, but to confine himself to work designated by the writer, is an unwarrantable interference with the business.¹

In the light of these authorities it is idle to talk about the defendants' acts and publications as mere incidents of a competition set on foot by complainant's declaration that he would not employ union printers; that the publications are shielded by constitutional guaranties; or that, viewed in the most unfavorable light, they are nothing more than libels, and the only remedy for any injury resulting is by an action at law.

It is claimed that the recital in the affidavit of Davis of what was said to him by the managers of the advertising department of Mabley & Carew and of Fechheimer Bros. & Co., when they withdrew their patronage from The Commonwealth, to wit, that it was because they had been visited by a committee of the Typographical Union, and were threatened with the loss of business, ought not to be considered, because it is hearsay.

There are two answers to this claim:

First. What was said is clearly admissible as part of the *res gestæ*, to show the state of mind of the persons in doing the act which their declarations accompanied.

Second. Upon the hearing of a motion for a preliminary injunction, the rules of evidence are applied less strictly than upon the final hearing of the cause, and consequently evidence that would not be competent in support of an application for a perpetual injunction should be admitted.²

The reason for the rule is plain. Probability of right is sufficient to authorize a preliminary injunction. In many cases it is granted to preserve property *in statu quo* during the pendency of a suit in which the rights to it are to be decided, and that without expressing, and oftentimes without having the means of forming, any opinion as to such rights.³

The rule, with the reason for it, applies with peculiar force when it is sought to exclude the statements referred to from consideration. The advertising managers made haste to deny that

¹*Re Wabash R. Co.* 24 Fed. Rep. 220.

²*Buck v. Hermance*, 1 Blatchf. 322; *Matthews v. Iron Clad Mfg. Co.* 19 Fed. Rep. 821.

³*Great Western R. Co. v. Birmingham & O. J. R. Co.* 2 Phil. Ch. 597.

any threats were uttered to them by anybody representing the Typographical Union. They did not, however, set forth what was said, nor did they deny that they withdrew their advertisements from The Commonwealth, nor intimate any reason for so doing other than that stated by Davis. It is not now the proper occasion to consider fully what prompted their denials. That, in the judgment of the court, should be reserved until the final hearing, after full opportunity to cross-examine Davis upon the one hand, and the advertising managers who made the denials upon the other hand, and to present to the court a full showing of all that was said when they were called upon by the committee of the Union.

The motion for a temporary injunction, to continue in force until the final decree, was granted.

Where a trade union and others form a combination to coerce an employer to employ or discharge hands, or to pay the fine of an employé due the union, by sending out notices to customers and materialmen of such employer to withdraw their patronage from him, and threatening, if this is not done, to forbid members of the union working upon material furnished to, or for contractors dealing with the employer, such action constitutes an unlawful conspiracy.

One whose business is injured by notices sent out by a trade union that, unless he discontinues sales of lime to a certain person, members of the union will be ordered not to work his material upon any building or for any contractor, has a right of action against the union and all persons engaged in the unlawful conspiracy, for the loss occasioned thereby.¹

In Oregon the intimidation of employer or employé is made indictable.²

In Pennsylvania provision is made for a board of arbitration.* Notice of an intention to discharge an employé is required, where such notice is exacted from employé. ⁴

¹*Moore v. Bricklayers Union No. 1* (Super. Ct. Cin.) 7 Ry. & Corp. L. J. 108.

²Hills Annotated Laws, 1887, Criminal Code, title 2, § 1898.

³Brightly Purdon's Digest (ed. 1885), p. 114. §§ 67-177.

⁴Acts 1887, chap. 122, §§ 1, 2.

Associations of employés are chartered by the Act 1889, chap. 215, sections 1-7.

Meeting of associations of mechanics are declared lawful.

§ 1. It shall be lawful for any and all classes of mechanics, journey-men tradesmen and laborers to form societies and associations for their mutual aid, benefit and protection, and peaceably to meet, discuss and establish all necessary by-laws, rules and regulations to carry out the same. . . . Provided the provisions of this Act shall not apply to the counties of Clearfield and Centre.¹

Strikes not conspiracies. § 2. It shall be lawful for any laborer or laborers, workman or workingmen, journeyman or journeymen, acting either as individuals or as the member of any club, society or association, to refuse to work or labor for any person or persons, whenever in his, her or their opinion the wages paid are insufficient, or the treatment of such laborer or laborers, workman or workingmen, journeyman or journeymen, by his, her or their employer is brutal or offensive, or the continued labor by such laborer or laborers, workingman or workingmen, journeyman or journeymen, would be contrary to the rules, regulations or by-laws of any club, society or organization to which he, she or they might belong, without subjecting any person or persons so refusing to work or labor, to prosecution or indictment for conspiracy, under the criminal laws of this Commonwealth. . . . Provided that nothing herein contained shall prevent the prosecution and punishment under existing laws, of any person or persons who shall in any way hinder persons who desire to labor for their employers from so doing, or other persons from being employed as laborers.

§ 3. The . . . proviso in . . . section [above] . . . shall be so construed, that the use of lawful or peaceful means, having for their object a lawful purpose, shall not be regarded as "in any way hindering" persons who desire to labor, and that the use of force, threat or menace of harm to persons or property shall alone be regarded as in any way hindering persons who desire to labor for their employers from so doing, or other persons from being employed as laborers.²

¹Brightly Purdon's Digest (ed. 1885), p. 1172, § 1.

²Brightly Purdon's Digest (ed. 1885), p. 1172, §§ 2, 3.

And it is held by the courts that a workingmen's organization to secure the payment of higher wages is not unlawful so long as it seeks the accomplishment of its purpose by fair persuasion.¹

The combining to lay out new townships without authority granted by the State is indictable as a conspiracy.²

In Rhode Island the law forbids the intimidation of employés,³ or obstructing business, etc.⁴ It is also declared unlawful to require notice from an employé of his intention to leave the employer under penalty of forfeiting his wages.⁵

In South Carolina labor associations are authorized by Gen. Stat. 1882, chap. 39, § 1376.

South Dakota forbids intimidation of an employé,⁶ and the employer is also protected by section 734.

In Tennessee it is unlawful to threaten to or actually discharge an employé for trading, or dealing, or for not trading or dealing, as a customer or patron with any particular merchant or other person or class of persons in any business calling.⁷

It is unlawful to dictate to employés the selection of a physician.⁸

In Texas it is an unlawful assembly, if three or more persons assemble to prevent any person from pursuing any labor or employment, or to intimidate him or interfere in any manner with his labor or employment.⁹

If the persons unlawfully assembled together by engaging in a riot, prevent anyone from engaging in any labor or employment it is criminal.¹⁰

So the intimidation of employés is forbidden.¹¹

The wages of railway employés cannot be reduced, except

¹*McCandless v. O'Brien* (Pa. C. P.) 21 Pittsb. L. J. N. S. 435.

²Act of April 11, 1795; *Com. v. Franklin*, 4 U. S. 4 Dall. 255, 1 L. ed. 323.

³Public Statutes 1882, chap. 241, § 8.

⁴Public Statutes 1882, chap. 242, § 40.

⁵Acts 1886, chap. 571, § 1.

⁶Revised Code, Dakota, 1883, Penal Code, chap. 57, § 733.

⁷Acts 1887, chap. 208, §§ 1-3.

⁸Acts 1889, chap. 259, §§ 1-3.

⁹Rev. Stat. 1879, Penal Code, title IX. §§ 279, 289.

¹⁰Rev. Stat. 1879, Penal Code, title IX. §§ 295, 304.

¹¹Acts 1887, chap. 18, § 1.

after 30 days' notice, if employé 15 days after notice either accept or decline such reduction.¹

The intimidation of railroad employés is made a crime.²

In Vermont, intimidation to prevent employment in mill, manufactory, shop, mine or railroad, subjects to fine or imprisonment. One who by himself or in combination with others drives another away and prevents his accepting or prosecuting work, with the purpose to accomplish this result, shall be imprisoned or fined.³

In Wisconsin, under the title of conspiracy, it is provided that any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars.⁴

In that State conspiracy to do an illegal thing is actionable if injury proceed from it; and where the illegal purpose has been executed, it is false and malicious, wherever the motive for the conspiracy to execute it was false and malicious.⁵

Blacklisting is unlawful;⁶ and so also is the intimidation of employés, injuring property, etc.⁷

Wyoming. Revised Statutes of 1887, title 7, §§ 589, 590, 599, authorize the incorporation of Knights of Labor. The Constitution, art. 5, § 28, authorizes courts of arbitration.

The Statutes of the United States define the crime of conspiracy as an unlawful agreement to do some act which is declared a crime by some other statute. See *ante*, section 52, for recent Act

¹ Acts 1887, chap. 30, §§ 1, 3.

² Acts 1887, chap. 92, §§ 1-2.

³ Rev. Laws 1880, chap. 196, §§ 4226-4227.

⁴ Acts 1887, chap. 287, § 1.

⁵ *Smith v. Nippert*, 76 Wis. 86; Acts 1887, chap. 286, § 1.

⁶ Acts 1887, chap. 349, § 1.

⁷ Acts 1887, chap. 427, §§ 1, 2.

of Congress.¹ The agreement by two or more persons to do an unlawful act, or to do a lawful act in an illegal manner, constitutes an existing conspiracy when an act is done in carrying out the agreement.² The crime of conspiracy is declared infamous; and is prosecuted by indictment in the United States courts,³ but a conspiracy to counterfeit coin is not within this section.⁴

So far as the United States government has attempted legislation it is directed against attempts to defraud the government.⁵ To deprive others of civil rights.⁶ To impede the administration of justice.⁷ Against the authority of the United States.⁸ To cast away vessels.⁹ The common law has no recognition in the federal courts.

Every officer or agent, appointed and acting under the authority of any revenue law, conspiring or colluding with any other person to defraud the government, is guilty of a misdemeanor.¹⁰ A conspiracy to deprive a citizen of his right to settle on public lands is punishable.¹¹

A combination or agreement taking effect to injure, frighten, intimidate or drive from the country the Chinese legally settled here, if there be forcible resistance of the national government, is within the offense defined as a conspiracy in preventing or retarding the taking effect of a law of the United States.¹²

The acts of all the public meetings throughout the land looking to, and providing for, depriving Chinese subjects of the rights, privileges, immunities, and exemptions secured to them by our

¹ Revised Statutes, § 440; *Re Wolf*, 27 Fed. Rep. 606; *United States v. Watson*, 17 Fed. Rep. 145.

² *United States v. Wooten*, 29 Fed. Rep. 702.

³ Revised Statutes U. S. § 5508; *United States v. Butler*, 4 Hughes, 512.

⁴ *United States v. Burgess*, 8 McCrary, 278.

⁵ Sec. 1842, Art. 60, Rev. Stat. (2d ed.) 1878, § 1624, Act 14, §§ 3169, 3490, 5438, 5440, chap. 8, Sup. Rev. Stat. vol. 1, 1881, p. 484.

⁶ §§ 1980, 1981, 5506, 5508, 5509, 5518, 5519, 5520.

⁷ §§ 5406, 5407.

⁸ §§ 5299, 5336.

⁹ § 5364.

¹⁰ U. S. Rev. Stat. § 3169; *United States v. Babcock*, 3 Dill. 566; *United States v. McKee*, 3 Dill. 546; *United States v. McDonald*, 3 Dill. 543.

¹¹ *United States v. Waddell*, 16 Fed. Rep. 221.

¹² U. S. Rev. Stat. § 5386; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766; *Re Baldwin*, 27 Fed. Rep. 187; *Re Impaneling and Instructing Grand Jury*, 26 Fed. Rep. 749.

treaties with China, by means popularly known as "boycotting," or any other coercive means, no matter in what form, or through what channels applied, are criminal, and all those participating in them must be subject to the very severe penalties denounced by the statute.¹

A conspiracy to acquire a settlement on Indian lands is not indictable.²

An agreement to cast away or wreck a vessel comes within the definition of conspiracy.³

The act of any one of the conspirators in carrying out the purpose to defraud the government will render all liable for the crime.⁴

A conspiracy to interfere with the free exercise of the right to vote at elections for federal officers is punishable.⁵

Such an interference with the right of a colored man, accompanied by personal violence is punishable under that section and sections 5508, 5520, when it results from a conspiracy formed to accomplish the prohibited purpose.⁶ So a conspiracy to deprive anyone of the equal protection or privilege under the laws is punishable.⁷ As to the operation of the law within the State, see *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766. Section 5440 covers a conspiracy by Indians against the government.⁸

A board of arbitration between railroads or between other transportation companies engaged in interstate commerce and

¹*Re Baldwin*, 27 Fed. Rep. 198.

²*United States v. Payne*, 22 Fed. Rep. 426.

³U. S. Rev. Stat. § 5364; *United States v. Hand*, 6 McLean, 274; *United States v. Cole*, 5 McLean, 513.

⁴Rev. Stat. U. S. § 5440; *United States v. Britton*, 106 U. S. 199, 27 L. ed. 708; *United States v. Hirsch*, 100 U. S. 83, 25 L. ed. 589; *United States v. Hammond*, 2 Woods, 197; *United States v. Friesbie*, 28 Fed. Rep. 806; *United States v. Fehrenback*, 2 Woods, 175; *United States v. Donau*, 11 Blatchf. 168; *United States v. Dennee*, 3 Woods, 47; *United States v. Boyden*, 1 Low, 266; *Re Wolf*, 27 Fed. Rep. 606; *United States v. Watson*, 17 Fed. Rep. 145; *United States v. Sanche*, 7 Fed. Rep. 715; *The Mussel Slough Case*, 5 Fed. Rep. 680; *United States v. Socia*, 2 Fed. Rep. 754.

⁵Revised Statutes U. S. § 5506; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *Seeley v. Koox*, 2 Woods, 363; *United States v. Oruitshank*, 92 U. S. 542, 23 L. ed. 588.

⁶*Ex parte Yarbrough*, 110 U. S. 651, 29 L. ed. 274.

⁷U. S. Rev. Stat. § 5519; *United States v. Harris*, 106 U. S. 629, 72 L. ed. 290; *Re Baldwin*, 27 Fed. Rep. 187.

⁸*Re Wolf*, 27 Fed. Rep. 606.

their employés, may be agreed upon and power is given such board to compel the attendance of witnesses.¹

The Alien Contract Labor Law, forbidding the bringing of aliens to this country under labor contract, Acts 1884-85, chap. 164, was amended by chap. 351, Acts 1890-91, and was added to by chap. 220, Acts 1886-87, also added to by chap. 1210, Acts 1887-88.²

The incorporation of National Trades Unions is authorized for the purpose of aiding its members to become more skillful workmen, promote their general intelligence, elevate their character, regulate their wages and hours and conditions of labor. The purpose of their organization also includes the protection of their individual rights in the prosecution of their trade, raising funds for the benefit of the sick, disabled and unemployed, and for families of deceased members, and for such other objects for which working people may lawfully combine, having in view their mutual protection or benefit.³

It was assumed in *Com. v. Sheriff*, 15 Phila. 393, that prior to the acts of the Pennsylvania Legislature, it would have been unlawful for workmen to combine, organize and adopt resolutions, having for their object the increase of wages, or the consideration to be paid for labor, if the effect of such combination might be to prejudice the interests of the community and might tend to injure individuals in their business by causing the employed to cease to work for an employer, and thus compel him to submit to a book or standard of prices which had been fixed by workmen who had combined and organized for that purpose. And it was said that nearly all the law of England, which had been adopted in this country touching organizations and combinations of workmen to regulate wages, has been swept away by the statute, that it is, therefore, since the statute, no longer unlawful for the representative of a labor society or organization, to demand from a firm of employers an increase of wages for their employés, with notice that refusal will result in a strike of the workmen, followed by such representatives going together to the workshop of the employers and notifying the journeymen that a strike was ordered.⁴

¹ Acts 1887-88, chap. 1063, p. 501, §§ 1-11.

² Acts 1890-91, chap. 551, p. 1084, §§ 1-11.

³ Acts of Congress 1885-86, chap. 567, p. 86, §§ 1-5.

⁴ See also *Mayer v. Journeymen Stonecutters' Asso.* 47 N. J. Eq. 519.

Mr. Gladstone, on December 10, 1891, at the opening of the National Liberal Federation Conference, held in Memorial Hall, Farringdon Street, London, urged the abolition of the common law against conspiracy. This law, he said, had given rise to proceedings that were adverse to the liberties of the people. In the course of his remarks he stated, as part of the Liberal program for future legislation :

“ We must provide for the rural population of Great Britain as well as for the same class in Ireland. Nothing must be a crime which relates to the prosecution of labor interests, or because it is done by a combination of men, unless it is an offense against the letter and the spirit of the law.”

This is a correct statement of the tendency of Liberal legislation proposed in England.

CHAPTER XV.

CONSPIRACY AT COMMON LAW—CONTINUED.

- § 76. *Legislation Affecting Common Law Concerning Combinations among Workmen.*
- 77. *Present Condition of the Law Concerning Trade or Labor Combinations, "Picketing," "Boycotting."*
- 78. *Indictments for Conspiracy.*
- 79. *Evidence in Conspiracy.*

§ 76. **Legislation Affecting Common Law Concerning Combinations among Workmen.**—It may well be questioned, whether the legislation referred to in the preceding chapter has materially changed the common law as it existed in this country, regarding labor organizations, and their relations to and influence upon the compensation to be paid for work, and the efforts to give force to this influence by the peaceful withdrawal of employes on their organized demands being refused, and by a strike declared. It is an undoubted rule of the common law, that it is criminal to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or parties or classes of the community, or even to the right of an individual. But because a combination of workingmen to raise their wages was deemed in the middle of the fourteenth century unlawful, as proving itself to result injuriously to classes of the community in England, it does not follow that it will be equally unlawful here, where we have no class legislation, and where our free institutions invite all, who as citizens stand on a common level—to unite and associate themselves together for the purpose of bettering their condition in every respect, moral, social or financial: where the highest purpose of self government is to develop and elevate manhood and free it from all trammels of tradition, drawing the line only where freedom is overpowered by license.

Indeed the common law precedents, decisions and statutes from the middle of the fourteenth century until 1859, and the succeeding changes in 38 and 39 Victoria, chap. 86, passed in 1879, must be

considered in relation to the then existing condition of society and its demands. The principle of the common law was then, as now, that conspiracy consisted in a combination to do a wrongful or unlawful act to the injury of the public or a portion thereof, but what constituted an unlawful act to the injury of the public, then, as now, depended upon social conditions and relations. It would be unreasonable indeed to insist that we must accept such precedents as "applicable to our local situation and circumstances," when in England, with advancing civilization, and the growing recognition of popular rights, legislation has from time to time liberalized the practice there. All the laws of the parent country, whether rules of the common law as illustrated in practice, or early English statutes, which were made for the purpose of regulating the wages of laborers, the settlement of paupers, and making it penal for anyone to use a trade or handicraft to which he had not served a full apprenticeship—not being adapted to the circumstances of our colonial condition, which recognized the equal rights of all as fully before as after the Declaration of Independence, were not adopted, used or approved, and therefore do not come within the description of the laws adopted and confirmed by the constitutions of the various states.¹

In determining, therefore, what the common law of this country is, as to organizations of workingmen and organizations of employers, whose result is to influence compensation to be paid for labor, we have simply to assume primarily, that all and each of such organizations for mutual benefit and advancement are lawful, and that all means used to promote their objects are lawful, until it is shown that the practical result of the association is, taking the good and evil together, injurious to the public or the parties, or to portions of the community, or to the rights of the individual. It is simply a question of fact, which cannot be determined by English precedents made under different conditions. As evidence upon this question of fact, the express legislation of the great labor states of this country, where the results of experience have been embodied in statutes, and the modern legislation in England, whose present purpose is in harmony with

¹*Com v. Hunt*, 4 Met. 111; *State v. Stewart*, 4 New Eng. Rep. 378, 59 Vt. 273.

our own, is of great value, and in the absence of direct legislation in any State upon the entire subject may, perhaps, be accepted as a fair statement of existing American common law on this subject. The aim of such legislation has been to mark the point where combined action on the part of those employing labor, or by those employed, became unlawful, because the evil resulting therefrom to the public, or to portions of the community, or to individuals, exceeded whatever of individual or collective good might result to the combiners. The continued increase of such legislation has afforded evidence of its success as a statutory expression of the common law, as applicable to our circumstances and conditions.

This view is given practical expression in *State v. Stewart* 4 New Eng. Rep. 378, 59 Vt. 273, where it is declared that in England and in this country it is lawful—and it may be added commendable—for any body of men to associate themselves together for the purpose of bettering their condition, and the very genius of free institutions invites them to higher levels and better fortunes. They may dictate their own wages, fraternize with their own associates, choose their own employers, and serve man and mammon according to the dictates of their own conscience. It is recognized that all the legislation and course of judicial decision in England and America has been progressively in the direction of according to laborers the enjoyment of equal rights with others, and to-day in England and here, workmen stand upon the same broad level of equality before the law with all the other vocations, professions or callings whatsoever, respecting the disposition of their labor and the advancement of their associated interests. Here, as there, it is unlawful for employers to coerce, intimidate or hinder the free choice of workmen in the disposal of their time, skill and talents. There, as here, it is unlawful for workmen wrongfully to coerce, intimidate or hinder employers in the selection of such workmen as they choose to employ.

In *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551, defendants, officers of a trade union, notified workmen by placards and advertisements, that they were not to hire themselves to plaintiffs pending a dispute between the union and the plaintiffs. The bill prayed an injunction to restrain the issuing of the pla-

cards and advertisements, alleging that by means thereof the defendants had in fact intimidated and prevented the workmen from hiring themselves to plaintiffs, and plaintiffs were thereby prevented from continuing their business, and the value of their property was seriously injured and materially diminished. Held, upon demurrer, that the acts of defendants, as alleged in the bill, amounted to a crime, and that the court would interfere by injunction to restrain such acts, as they also tended to the destruction or deterioration of the property.

In the case of *Reg. v. Druitt*, 16 L. T. N. S. 855, it was laid down as law by *Mr. Baron* Bramwell, that it was not illegal for workmen to combine together to regulate the amount of wages, so long as they used no threats or violence to prevent other men from hiring themselves.

In *Skinner v. Kitch*, L. R. 2 Q. B. 393, where a master builder received notice from a carpenters' union, that four of his men who belonged to the union would be ordered to leave his employment unless a fifth workman, also in his employ, became a member of the union, it was decided that the secretary of the union was guilty of having by threats endeavored to force the employer "to limit the description of his workmen." A conspiracy to force the discharge of certain workmen under threat to quit the employment if it is not done, is unlawful.¹

Baron Bramwell in the case of *Reg. v. Druitt*, 16 L. T. N. S. 855, in his direction to the jury said that "every man is at liberty to induce others" by persuasion or otherwise, to enter into a combination to keep up the price of wages or the like; but directly he enters into a combination which has, as its object, intimidation or violence, interfering with the perfect freedom of action of another man, it then becomes an offense, not only at common law, but also an offense punishable by the express enactment of the Act of 6 George IV., chap. 129.

In England, as here, no employer can say to a workman, he must not work for another employer; nor can a workman say to an employer, he cannot employ the services of another workman.

¹*State v. Donaldson*, 32 N. J. L. 151; *Reg. v. Rowlands*, 17 Q. B. 671; *Reg. v. Banks*, 12 Cox, C. C. 893; *Reg. v. Bunn*, 12 Cox, C. C. 816; *Collins v. Hayle*, 50 Ill. 855; *Com. v. Hunt*, 4 Met. 111; *Hooker v. Vandewater*, 4 Denio, 849; *People v. Trequier*, 1 Wheel. Crim. Cas. 151.

While the law accords liberty to the one, it accords a like liberty to every other one, and all are bound to so use and enjoy their own liberties and privileges as not to interfere with those of their neighbors. The labor and skill of the workman, the plant of the manufacturer, the equipment of the farmer, the learning, skill and experience of the professional man, the skilled artisan or artist, are in an equal sense property. Every man has the right to employ his talents, industry and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this matter, it is a criminal conspiracy, whether the means employed are actual violence or a species of intimidation which works upon the mind. The law in this country and in England forbids an interference with the property rights of third persons, or any restraint upon the lawful prosecution of their industries, as well as any unlawful control over the free use and employment by workmen of their own personal skill and labor, at such times, for such prices, and for such purposes as they please.

In the first count of the indictment in *State v. Stewart*, 4 New Eng. Rep. 378, 59 Vt. 273, an unlawful conspiracy and agreement was charged to prevent, hinder and deter by violence, threats and intimidation the Ryegate Granite Works from retaining and taking into its employ O'Rourke, Goodfellow and others. In the second count, after relating the malicious intent to control, injure, terrify and impoverish the Granite Company, the pleader charges an unlawful conspiracy and agreement to terrify, frighten, intimidate and drive away by threats and intimidation O'Rourke, Goodfellow and others, who were then and there workmen and laborers of such company. These counts were held to sufficiently charge a conspiracy at common law, by means unlawful under the statute. The third and fourth counts set forth more particularly the methods adopted to interfere with the prosecution of its business by the company. They charge the defendants with an intent to prevent the prosecution of the work of that company by threatening O'Rourke, Goodfellow and others, that the Ryegate Granite Works were "scab shops," all workmen therein were "scabs," and their names would be published in the "scab" list in the Granite Cutters' Journal, and that they should be shunned and not allowed to work with other granite cutters, and would be

disgraced in the craft, etc., by all which O'Rourke, Goodfellow and others were frightened and driven away from said shop. These counts were held sufficient.

In *State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 46, the court sustained an indictment for a conspiracy which charged that the defendants conspired to threaten and use means (the boycott) to intimidate the Carrington Publishing Company, to compel it against its will to abstain from doing an act (to keep in its employ workmen of its own choice) which it had a legal right to do, and to do an act (employ the defendants and such persons as they should name), which it had a legal right to abstain from doing. As charged in the information, the defendants' purpose was to deprive the publishing company of its liberty to carry on its business in its own way, although in doing so it interfered with no right of the defendants. The motive was to gain an advantage unjustly and at the expense of others, and therefore the act was legally corrupt. As the means of accomplishing the purpose, the parties intended to harm the publishing company, and therefore it was malicious.

"All conspiracies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law."

It was held, however, in *People v. Petheram*, 7 West. Rep. 592, 64 Mich. 252, that such a statute does not require malice to be shown against the owner of the business disturbed, or his property, in the same sense as does the common law in cases of malicious mischief. These statutes, it is said, were passed to prevent and punish a course of proceedings for the punishment of which the common law furnished no precedents, as they are of comparatively recent origin. The offense consists in the commission of certain acts, or in conspiring to commit the same; and the manner of committing them may furnish, if unexplained, a sufficient proof of the malice necessary under the statute, to be proven in the same way as malice is established in other cases. Thus when a man commits an act unaccompanied by any circumstances justify-

¹ Hawk. P. C. chap. 72, § 2; 3 Chitty, Crim. L. 1138; Archb. Crim. Pr. 1830; *Carew v. Rutherford*, 106 Mass. 1; Gibson, *Ch. J.*, in *Com. v. Cartlisle*, Journal, Jurisp. 225; *Smith v. People*, 25 Ill. 17; *Com. v. Hunt*, 4 Met. 111, 128; *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551.

ing its commission, the law presumes that he acted advisedly and with an intent to produce the consequences which have ensued.

After the enactment of the Statute in 1870, it was held in 1886 that the orderly and peaceable assembling or co-operation of persons employed in any calling, trade or handicraft, for the purpose of obtaining an advance in the rate of wages and compensation, or of maintaining such rate, is not a conspiracy. Laboring men may lawfully do this, provided they do not extend the purpose or result of the combination to prevent other people from working at prices to suit themselves.¹ So also in Pennsylvania.²

Employés may stop working, if their employer unjustly refuses to accede to their just demands. They may do their utmost, by speech, writing, suasion, appeal, and in every other lawful way, to persuade their fellow workingmen not to fill their places, nor to aid their late employer in his unjust stand.³ But if others, despite their appeals, determine it is their own interest to fill the vacant places at the prices offered, it is unlawful and a criminal conspiracy for the combination or its agents to coerce them by threats, or intimidation, or violence.⁴ That no actual violence was used where men, in pursuance of a conspiracy, congregated about the door of a bakery and distributed circulars to passers-by, will not relieve the actors from the charge of criminal conspiracy, if what they did amounted in effect to intimidation of such passers, or of the proprietor of the bakery.⁵ In the *Theiss Boycott Cases*, the distribution of circulars by combined effort in places of business, to intimidate customers or to injure the proprietors, is declared punishable as conspiracy.

In an indictment for extortion, where the conviction was reversed by the general term of the supreme court of New York, November 30th, 1891,⁶ the indictment charged the defendant with having obtained a check for the sum of \$100, and of the value of that amount, from Abraham Popkin and Abraham Marks, who

¹*People v. Witzig*, 4 N. Y. Crim. L. Rep. 408.

²*Com. v. Denny*, Lewis, Crim. Law. 625.

³See also *Reg. v. Hibbert*, 18 Cox, C. C. 82; *Reg. v. Shepherd*, 11 Cox, C. C. 325; *Reg. v. Druitt*, 10 Cox, C. C. 592.

⁴*People v. Witzig*, 4 N. Y. Crim. L. Rep. 418.

⁵*People v. Kostka*, 1898, 4 N. Y. Crim. L. Rep. 420.

⁶*People v. Baroness*, 41 N. Y. S. R. 659.

were copartners in trade, carrying on business in the city of New York as cloak manufacturers, by means of a threat made by him to them to do an unlawful injury to their property, that is to say, to injure and destroy their business and prevent and hinder them from carrying on the same. It appeared by the evidence that these two persons were cloak manufacturers, employing a large number of persons in that business, and that in January, 1891, a strike took place, by which the persons in their own immediate neighborhood and those employed by contractors with them refused to work until a more satisfactory arrangement might be made for their compensation. While these persons were on their strike the firm employed others to manufacture their garments, who were either non-union persons or else engaged in the employment in violation of the rules of their union. And efforts were made to arrange and agree upon terms which would be satisfactory to the individuals who were out upon the strike and would induce them to resume their former employment. And in the course of these proceedings the defendant acted on behalf of the persons who were engaged or combined in the strike. He acted as their representative and was the manager of the Cloak-maker's Union. With him also were associated other persons as a committee, who participated in the negotiations had with the members of this firm, Popkin & Marks. A result was reached by which a scale of prices was agreed upon and assented to by the defendant on or about the 24th of January, 1891. But they proved to be unsatisfactory to the individuals engaged in the strike, and further negotiations continued to obtain more advantageous terms by way of compensation for the services of the individuals included in the strike. These were finally obtained on the 9th of February, 1891, and it was agreed that the former employees of the firm should return to their work, provided the firm discharged the persons from their service who in the meantime had been employed by them.

The members of the firm consented to this condition, as well as the scale of prices, and discharged the persons from their employment who were not members of the union, or who as members had been engaged in their employment in violation of the rules or regulations of the order. But the persons who had been upon the

strike did not return to the services of the firm. And evidence was given upon the trial of the indictment by Mr. Popkin to the effect that he inquired of the defendant why it was that these persons had not resumed their employment, as that had been arranged between them and the members of the firm. And his evidence is that the defendant then informed him that the persons who had been upon the strike did not return to the employment of the firm for the reason that Popkin had not settled with the defendant. "What kind of a settlement have I got with you? I don't owe you any money." And then the reply was, "You have got to pay me five hundred dollars to have your people back again to work. . . . If you want to have your people back again to work, you have got to pay me that amount of money." "I told him I didn't know what for. Finally he said to me, 'I will take three hundred dollars.' I told him, 'I wouldn't give you one cent, because I don't know what for.' He says, 'If you do not give me the three hundred dollars you can't have your people back again to work.'" And when this conclusion was reached and asserted, the defendant, together with one of the persons, named Zipkin, who was with him, left the store, and shortly afterwards Zipkin returned and said something about a settlement for \$100. This statement was made to Mr. Marks, the other partner. And shortly after that the defendant returned to the store with Mr. Zipkin and then stated, "I will take \$100. I am doing this as a favor to Zipkin, and instead of three hundred dollars, if you want your people back, I will take one hundred dollars." And thereupon a check was given to the defendant, subscribed by the firm, for the sum of \$100, upon which the defendant received the money. The witness further testified that he believed at the time the check was paid to the defendant that the latter had the power to keep his men from returning to their work, and it was in that belief that he paid the money. The evidence given by Marks, the other partner, was not so full or complete as that obtained from the witness Popkin, but it still tended to corroborate the evidence of the latter. And so did that of the witness Berman, who was the book-keeper of the firm. It was also stated that the defendant represented himself as having the control of these persons who previously had been in the service of the firm, and had agreed to return to that employment.

It was said by Barrett, *J.*, in an opinion pronounced by him for the court, reversing the judgment below, that the main question in this case is whether the obtaining of money from another, with his consent, induced by a threat to injure the business of the individual threatened, by persuading his employees to absent themselves from work, is "extortion," as that offense is defined in the Penal Code, §§ 552, 553, subd. L. In an opinion pronounced by the same judge it was held, in the case of *People v. Wilzig*, 4 N. Y. Crim. Proc. Rep. 403, that it was extortion to procure money by fear induced by the threat to continue a so-called "boycott," in which the elements of violence, intimidation and direct injury to tangible personal property were prominent and marked features. It was also ruled in those cases that the threat to do an unlawful injury to the property of another, which is one of the statutory conditions of this offense, might be predicted of an intimidating attitude on the part of those engaged in an overt act without actual violence or direct threat by word of mouth. Actual violence was there proved, also actual injury to the complainant's furniture, goods and fixtures; and the question whether the threat to continue the "boycott" in the manner in which it had been conducted amounted to a threat to continue the physical injury to the complainant's furniture, goods and fixtures, was left to the jury.

In the case at the bar the elements of violence, intimidation and physical injury to the tangible property are entirely wanting. The threats made were not threats of violence, nor was the attitude of the defendant or his associates an attitude of physical intimidation. The utmost that can be claimed by the prosecution is that the defendant, as a leader, exercised sufficient influence over the complainant's employes to keep them from resuming their employment until he was paid the sum finally agreed upon. He utilized that influence and held it over the complainants to accomplish his purpose. The employes, whom he professed to represent, were equally free from violence or from an attitude of intimidation. Thus the threat, as already stated, was merely that the men would not work until the defendant was paid. And it is asked, Was that a threat to do an unlawful injury to the complainant's property? The answer, it is said, must be in the neg-

ative. It certainly was not a threat to do injury to the material or to the other property contained in the complainant's place of business. It was therefore, simply a threat to injure his business or estate; in other words, to reduce his gains or to prevent his making gains. There can be no doubt that any injury to one's business is an "injury to property" for the purposes of a civil action. Indeed, the Code of Civil Procedure, § 3343, subd. 10, defines an injury to property as "an actionable act whereby the estate of another is lessened." But this definition is expressly limited to the construction of the Civil Code, § 718. It must be supposed that the Legislature thus intended to eliminate mere actionable acts, whereby the estate of another is lessened, from the domain of criminal offenses, and to limit indictable wrongs to injuries done to personal property, as such property is described in the penal code. Thus a threat unlawfully to injure "goods, chattels and effects," or to deface or destroy "money, evidence of rights in action or written instruments" of a particular description, would be a threat to do an unlawful injury to property, and would suffice to make out a case of extortion. This view is in harmony with the general purpose and intent of criminal jurisprudence which deals mainly with what is materially evidenced. The opposite view would leave the question of guilt or innocence to be decided, not by the act of the accused alone, operating upon some tangible thing, but by evidence *aliunde* with respect to an intangible condition of affairs.

If, for instance, property here means "business," then what was the threat, and how was it to work an injury to the complainant's business? It was, as we have seen, a threat to keep people from working for the complainants. Not all people, but the former employes of the complainants. Why should that necessarily work an injury to their business? Only by showing the urgent present need of workmen, the inability to secure competent persons to fill the places of the former employes, the actual condition of the material required to be manufactured, the extent of existing orders for manufactured goods, and a variety of other considerations going to make up the present status of the business. Now, if the complainants could supply the places of the former employes with better workmen, at less wages, then the threat

would be to benefit the business, not to injure it. But even if the tendency of the act threatened, might be to injure the business, how could that help the matter? The statute does not deal with tendencies or probabilities, much less possibilities. The threat must be to do an unlawful injury to property; not to do something which may affect it injuriously, but which must injure it.

If the prosecution is right, the statute would operate upon "good will" as well as upon reduced profits; in fact, upon property invisible and non-objective, the very existence of which would have to be brought to light by independent evidence. The *corpus delicti* is, first, the obtaining of the property, and second, the threat to injure some specific thing by a direct physical attack upon the object of the threat. Property and person are placed in the same category, and the property contemplated is something that can be injured in the same way as the "person" can be injured.

This injury, whether to person or property, it is said, must be surely direct. The prosecution, for example, cannot say that, although there was no threat to molest the complainant physically or even to touch his person, yet the menace, if executed, might have affected his nerves and thus injured his person. Consideration of the law as it existed prior to the penal code adds force to this construction. At common law, extortion signified any oppression by color of right; but, technically, it was defined to be the taking of money by an officer by reason of his office, where none at all was due, or not so much due, or when it was not yet due.¹

These rules as to the taking of unlawful fees we codified in the Revised Statutes.² And we also find there a provision making a verbal or written threat to accuse another of any offense, with intent to extort property or money, a misdemeanor.³ The obtaining of money by force or fear does not, therefore, seem to have been extortion either at common law or under the Revised Stat-

¹For note 2 Wharton's Crim. Law, (3d ed.) 833; 1 Hawk. P. C. Ch. 68, § 1; *People v. Whaley*, 6 Cow. 663.

²2 Rev. Stat. Edm. ed. 669, 670, §§ 5, 6, 7; Id. 778, 779, sec. 17.

³2 Rev. Stat. Edm. ed. 712, § 2.

utes. It was robbery at common law to extort money under the threat of charging one with an unnatural crime.¹

And this view was taken of the provision of the Revised Statutes defining robbery in the second degree, in *People v. McDaniels*, 1 Park. Cr. 198, notwithstanding the specific legislation before referred to, making the threat of such an accusation, with intent to extort money, a misdemeanor. Under the Revised Statutes the sending of a letter threatening to accuse any person of any crime, or to do any injury to the person or property of any one, with the view or intent to extort any, etc., was declared to be an attempt to rob. And the fact that this offense was placed in the same class as that of robbery was emphasized in *People v. Griffen*, 2 Barb. 427.

It will thus be seen that the offense now under consideration, though classed for the first time in the Penal Code as extortion, really completes the legislation against robbery, attempts at robbery, and cognate offenses. Section 552 of the Penal Code is in the alternative, treating extortion by force and fear as one thing, and extortion by official action as another. These two methods of extortion are separately defined in subsequent sections, but it is apparent from the language of the section providing the penalty by force or fear (§ 554) that the latter is but a supplement, under the name of extortion, to robbery in the first, second and third degrees. This section (554) provides for such punishment only when the money or other property has been extorted by force or fear "under circumstances not amounting to robbery;" in other words, when the money or other property has been claimed "with the consent" of the complainant and not "against his will." For really the main distinction between robbery in some degree and this form of extortion lies just there. Robbery is the unlawful taking against the will by means of force or violence or fear of injury, immediate or future, to one's person or property, (Penal Code, § 224); while extortion is the obtaining with consent by similar means. Thus unless robbery could be predicated of the taking against complainant's will of the money here obtained with their consent (that is, in case such money had

¹*Rex v. Jones*, 1 Leach, C. C. 189; *Rex v. Donnelly*, 1 Leach, C. C. 193; *Rex v. Cannon*, R. & R. 146.

really been taken against their will), it is difficult to see how extortion can be sustained in a case where it was taken with his consent. It certainly would be a novel indictment for robbery which charged the taking the property against the will of the complainant by means of fear of injury to his property, *e. g.*, his business, resulting from threats on the part of the robber or highway-man, that he would use his influence with the complainant's landlord not to extend his lease, or with the manufacturer not to sell him goods, or with the banks not to discount his paper.

But another difficulty is pointed out, which exists in the case under consideration, and that is that the injury threatened must in itself be "unlawful." Now, the abstention of work on the part of the operatives was not unlawful. It is not claimed that they broke any contract of service or hiring, knowing or having reasonable cause to believe that the probable consequence of so doing would be to endanger human life or to cause grievous bodily injury or to expose valuable property to destruction or serious injury. Penal Code, § 673. It is not, in fact, pretended that these operatives were working for the complainants under any special contract at all. On the other hand they were not guilty of "conspiracy," for the reason that orderly and peaceable co-operation for the purpose of obtaining an advance in the rate of wages is expressly excepted from the conspiracy sections. Penal Code, § 170. This exception was further emphasized by an amendment to § 675 of the Penal Code, which went into effect on the 1st of September, in the present year, and which reads as follows: "But nothing in this Code contained shall be so construed as to prevent any person from demanding an increase of wages or from assembling and using all lawful means to induce employers to pay such wages to all persons employed by them as shall be a just and fair compensation for services rendered." Thus, the opinion declares, the law is unmistakable that so long as there is neither violence nor an attitude of intimidation nor interference with others, employes are free to work or to refrain from working, as they please; free individually and free in combination. The attitude of the complainant's employes, at the time the threat in question was made, was not, therefore, unlawful. It would seem to follow that a threat to induce a continu-

ance of their lawful attitude could not of itself be unlawful, at least in the sense of criminal. Whether a civil action would lie for damages sustained by the defendant's acts is a question not involved in the decision. It is sufficient in the judgment of the court, for the determination of the case, that the defendant's threat to use his influence to keep men from working for the complainants, however wrong morally, was not criminal. It was not a threat to do the complainants an unlawful injury, but to continue a condition of things which, even if injurious, was undoubtedly lawful. The act threatened, that is, the act of advising, persuading or exhorting the men not to resume work, was not in itself indictable, and was not in itself more unlawful than the act of the men in abstaining from work. The statutory crime does not consist of a threat to do an improper or unjust act, nor to do an unlawful injury to the property of another. Whatever injury was being done to the complainant's business at the time of the threat in question was not an unlawful injury. And it follows that the defendant cannot be said to have threatened to do an unlawful injury to such business.

It was for these reasons that the judgment and conviction were reversed, and a new trial ordered.

There was also filed by Ingraham, *J.*, an opinion concurring in the reversal. He stated that the crime of extortion is defined by section 552 of the Code to be the obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official right, and the defendant claimed on the trial that he is not guilty of extortion as defined by this Act, and that conceding the testimony offered on behalf of the people to be true, the crime was not proven.

By section 553 of the Penal Code it is provided that "fear, such as will constitute extortion, may be induced by a threat to do an unlawful injury to the person or property of the individual threatened, or to any relative of his or to any member of his family," and therefore it is said, that to support this judgment it must appear that the defendant extorted from the firm of Popkin & Marks the \$100 mentioned in the indictment by the wrongful use of fear induced by a threat to do an unlawful injury to the property of such firm.

The conclusion is reached from an analysis of section 553 that the threat to induce fear as defined by the section must contain two elements: first, the threat must be to do what is unlawful; and second, the injury must be an injury to the property or person of the individual threatened, or to a relative of his or to a member of his family; and unless it appears that what the person threatened to do was unlawful, and, if performed, would do an injury to the person or property of the person threatened, the party making is not guilty of the crime.

In construing the section of a code the rule is recognized, that we should give a reasonable construction to the language used, not a forced and unnatural construction, extending the meaning of the words so as to include threats which a person of ordinary intelligence would not understand to be within the fair meaning of the language.

Popkin & Marks were coat manufacturers in the city of New York. Their employes had left work in consequence of a dispute between themselves and the firm as to wages, and on the 9th of February an agreement was arrived at between the firm and their employes whereby the employes agreed to return to work on the following morning.

On that morning, however, they did not return to work, but the defendant came to the office of the firm accompanied by several of the firm's employes and at that time he demanded the sum of \$500, saying to Mr. Popkin: "You have got to pay me \$500 to have your people back again to work." Upon the refusal of Popkin to pay any sum, he reduced his demand to \$300, saying: "If you do not give me \$300 you cannot have your people back again to work; I will take \$300 as long as I am here, and as quick as I am going to leave this place it will cost you \$500."

That demand was refused and defendant left his place. In a few minutes Zipkin, one of his companions, returned and after some consultation with Marks, one of the members of the firm, Marks said he would pay the defendant \$100. Zipkin left and in a short time returned with the defendant, who then said: "I will take \$100; I am doing that as a favor to Zipkin and instead of \$300, if you want your people back I will take \$100."

A check was then drawn by the firm to the order of the defendant and given to him, upon which he drew upon the bank account of the firm the sum of \$100, and this is the only evidence of any threat made by the defendant to Popkin & Marks, or to anyone.

Upon this statement of facts it seems clear, it is said, that there was no threat to do an unlawful injury to property. The defendant did not expressly threaten Popkin & Marks that he would do anything himself; there was no statement that he would prevent the men from working; what he said was that they would not return to work. It was certainly not unlawful for these men to refuse to work for Popkin & Marks, nor was it unlawful for defendant to advise them not to work. There was no threat, therefore, in the opinion of the judge, to do an unlawful act. Defendant did not of his accord go to the place of business of Popkin & Marks, but was sent for by them, and his statement that the men would not return to work, even if that could be construed into a threat that he would prevent them from returning to work, was not a threat to do an unlawful injury to the property of Popkin & Marks, because of the fact that unless the men did return Popkin & Marks could not advantageously continue their business.

If one of Popkin & Marks' employes had refused to work for them, such a refusal, although it might have seriously affected their business, might have caused them serious loss, would not have been, it is said, an unlawful injury to their business, because an employé had the legal right to work for Popkin & Marks or not as he pleased, and if it was not unlawful for an employé to refuse to work it was not unlawful for a third-party to advise or induce him to refuse to work, so that a threat of such third party that he would prevent such employé from working would not be a threat to do an unlawful injury to the employer's business.

It is suggested that many illustrations might be given of instances where the exercise of a legal right by one person would cause an injury to the property of another, and where there is no penalty for liability because of the exercise of such right. Thus the owner of a dwelling-house could devote it to business pur-

poses and thereby injure the value of adjoining property. Yet such use would not be an unlawful injury to the adjoining property, and a threat by the owner to make such use of his property would not be a threat to do an "unlawful injury" to property. It might be said to be a threat to do a "lawful injury" to the adjoining house, but such a threat is not sufficient to sustain a conviction for extortion, and it is equally clear that a threat to induce the owner thereof to so use his house is not a threat to unlawfully injure property, because if it is not unlawful for the owner to use it for a particular use, it is not unlawful for a person to procure the owner so to use it. Nor can such a threat be said to be a threat to do an injury to the property.

There is no evidence that the defendant had any knowledge that Popkin & Marks had any unmanufactured goods on hand at the time of the occasion in controversy, or that he knew, or had reason to know, that the refusal of the men to return to work would cause injury to any of their property.

Popkin & Marks had a right to employ such men as they chose, and their employ  s had a right to work for whom they chose, and the mere supposition that the refusal of this particular body of men to work for Popkin & Marks would in some way embarrass them in manufacturing goods for their fall trade, is all that there is to sustain the charge that this was a threat to injure property.

But it is said to be clear, that the evident intent of the statute is that the threat should be to injure a specific piece of property.

There must be the existence of a *res* and a threat to injure it.

The section in question is part of chapter 5 of title 15 of the Penal Code. The title treats of crimes against property and includes arson, burglary and house breaking, forgery and counterfeiting, larceny, embezzlement and extortion. The word "property," as defined by section 718 of the code, would not include a man's business, and there could not certainly be an indictment for larceny for stealing the business.

The meaning of a threat to do an unlawful injury to the person of an individual would be a threat to, in some way, injure his

body, and the threat to do an unlawful injury to his property, applying the words in their ordinary significance would be in some way to injure some specific property.

It could hardly be claimed that a threat to injure a person's character, or his professional reputation would be an injury to property within the meaning of this act; and yet, such a threat, where the successful conduct of such person's business depended largely upon his character and reputation, might seriously injure his business.

It is a threat to injure the thing that constitutes the crime; not to do an act which indirectly may do damage to business or its successful conduct.

The conclusion therefore which *Judge Ingraham* also reaches, is, that the evidence was not sufficient to sustain the conviction.

Whether under like legislation, other courts will probably reach the same results, may be perhaps reasonably conjectured on comparing the reasons assigned by *Daniels, J.*, for advising an affirmance of the judgment. He states these reasons substantially, as follows:

At the close of the case on the part of the people, a motion was made for the acquittal of the defendant, which was denied, and the counsel for the defendant excepted to that denial. This motion evidently proceeded upon the theory that the threat which the jury could very well imply or infer from what is stated to have taken place was not such a threat as the law required to create the offense of extortion. And that position has been taken in support of the present appeal from the judgment. Whether the evidence was sufficient to place the case within the provisions of the law relative to this offense must depend upon the construction which should be given to the statute enacted to define and punish the crime of extortion. It has been declared by § 552 of the Penal Code of the State that "extortion is the obtaining of property from another with his consent, induced by a wrongful use of force, or fear, or under color of official right." And by § 553 of the same code, it has been declared that: "Fear, such as will constitute extortion, may be induced by a threat to do an

unlawful injury to the person, or property of the individual threatened, or to any relative of his, or to any member of his family." Assuming the evidence of the witness Popkin to be reliable, as that may properly be done inasmuch as the jury appears to have accepted it as truthful, the point is presented whether a threat to prevent the persons who had been upon the strike from returning to and entering the employment of the firm was a threat to do an unlawful injury to the property of this firm. It is stated in the evidence of the witness first sworn, that they had on hand material cut up and ready for manufacturing, and not manufactured, and that what was cut and uncut amounted to the sum of about \$50,000, and that was designed to be manufactured by the firm in the course of its business. It was also stated that the season for the sale of their manufactured garments closed about the 15th of April. The firm at the time had become, by the discharge of the persons who had been employed by it, incapable of proceeding with the manufacture of these garments, and had placed itself and the business carried on by it in a state of entire dependence upon the individuals who had been engaged in the strike. And the effect of what is stated to have been said by one of its members by the defendant was that this business should be interrupted and necessarily remain in suspense until the money which was demanded should be paid over.

The defendant, according to the testimony of Mr. Popkin, asserted himself to be in such a relation to the persons on this strike, even after they had adjusted their difference as to a compensation, as to control their movements and prevent them from returning into the service of the firm, unless his demand was satisfied. By this interposition of his authority over the working people the belief is stated to have been produced that the persons would not return to their employment until this money was paid to the defendant. And in the opinion of the judge writing the dissent that of itself was a threat on his part to injure the property or business of the firm, for the interruption of the business would necessarily be attended with loss to the firm. And a loss resulting from the suspension or interruption of the business would necessarily be an injury to property, and it was to avoid that injury that this money was paid over.

It is not thought that the statute requires the narrow construction insisted upon by the defendant's counsel. For it has not been, either by its language or reasonable import confined to the case of an actual injury to some specific article of property, but it has been made to include the threat to do any unlawful injury to property. And business is property, as much so as the articles themselves which are included in its transactions. Besides that this term "property" has been so defined by subds. 9, 14 and 15 of § 718, of the Penal Code, as to include the business itself and the loss resulting from its interruption. By the first of these subdivision it has been declared that, "the term 'property' includes both real and personal property, things in action, money, bank bills, and all articles of value." And it has been further declared by subd. 15 of the same section that the term "personal property" includes every description of money, goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation right or title to property, real or personal, is created, acknowledged, transferred, increased, defeated, discharged or diminished, and every right and interest therein. And this is conformable to the significance given to the same term by legal writers. For it has been said by Blackstone that property consists in the free use, enjoyment and disposal of all the owner's acquisitions, without any control or diminution save only by the laws of the land. 1 Bl. Com. (Sharswood's ed.) 138.

And in *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 395, it was stated in the opinion of the court that, "property is a thing owned, that to which a person has or may have a legal title." And in all its attributes it has been brought within the protection of the constitution of both the nation and the State by the declaration that no person shall be deprived of property without due process of law. And that includes, in the opinion of the judge, within this term, a business which may be built up for the manufacture and sale of property, as well as the tangible articles themselves employed or used in the course of such business. It is said there would obviously be no reason for so distinguishing the word "property," as it has been used in the sections of the code, as to apply it solely to tangible articles capable in and of themselves of receiving direct injury by the unlawful or wrongful act of

another. The section has not employed the term in that manner, but it has included it in its broad and unrestricted sense, applying its prohibition to whatever may be properly maintained to be property. And the business of persons engaged in it is certainly, within the unrestricted significance of the term as it has been employed, as much a matter of property as any of the goods or garments sold in the course of such business. And the inference is therefore drawn that the defendant was not entitled to the direction which was asked for in his favor, for the evidence did tend to establish the existence of an offense within the scope of this indictment.

On the trial an exception was also taken to what was stated to have been said and done at one of the meetings held by the cloak-makers. Mr. Zipkin was the chairman of that meeting, and was with the defendant at the office of the firm when the prices were fixed. And not only from the evidence given on the part of the prosecution, but that also produced in behalf of the defendant, it was made to appear that he was their substantial representative, and that his services were employed to harmonize the differences between the cloak-makers and this firm. And both on behalf of the prosecution, as well as the defendant, the proceedings of the meetings of the cloak-makers were in order to exhibit their intention and state of mind concerning the resumption of their employment. They were, in fact, as the evidence indicated the case to be, co-operating together. They asserted their claims, and the defendant endeavored to obtain such concessions as would satisfy these persons. And there was consequently no impropriety in showing what was exacted by them as a subject matter falling within the province of the defendant for negotiation and settlement. There was really no dispute as to the exactions, or the fact that they co-operated together to secure the concession of their terms, or the settlement upon others which would be satisfactory to them. Both parties were acting to bring about this result and to attain it it became necessary to understand what the cloak-makers themselves required should be made in the way of concessions or advanced compensations for their services. And evidence of what took place at their meeting was admissible for the purpose of proving what they insisted upon, and what the defendant himself endeavored to secure in their behalf.

Upon the examination of the defendant as a witness he was asked whether he kept the money himself, that sum of \$100. An exception was taken to the sustaining of an objection to this question. Now the theory of the defense is that the defendant demanded this money not for himself, but as some compensation for the cloak-makers during the time they had been engaged in the strike. And the object of the inquiry was probably to show that he had paid over the \$100 to them, or for their benefit. If no other evidence had been given concerning this money, it would probably have been error to have excluded this answer. But the witness himself has previously stated that he went with Mr. Zipkin and cashed a check, "and got the money, and went with Mr. Zipkin to the office and delivered the money to the cashier." He also testified that he stated to Mr. Popkin that he took the money to be distributed between the working people of Popkin & Marks; that he obtained it at their request as they had instructed him, and did not receive it intending to appropriate any of it to his own use. This, with the other evidence, was all that was required to be proved to relieve the defendant from this criminal accusation if the jury had confided in his statement.

The defendant was also interrogated as to remarks that he had made at a meeting at which he was present as one of the speakers. But there was no error in the opinion of the judge in taking his answer as to what he had said at the meeting as some evidence bearing upon his general intention in the control or management of the affairs of the unions. He stated generally that he believed the working people had a right to unite themselves and form a union and ask for justice. He was undoubtedly correct in this statement. This subject was very fully examined in *Thomas v. Mut. Prot. Union*, 49 Hun, 171, in which Judge Daniels examined the authorities accessible on this subject. And it was there concluded that all persons had the right to prescribe the terms upon which they would perform their services. And that this was not only an individual right, but it was one which could be protected by the combination of two or more persons. And it was their right to refuse to render their services for any person who might be offensive or disagreeable to them, or with any person who should not, for any cause, receive their approval; that so far the law permitted all working people to combine together either

for their individual or their mutual protection. It is true that these views were not there expressly accepted by the other members of the court, but they are still deemed to be well supported by the authorities, and the case in which they were expressed, as it was in fact decided, is no authority to the contrary, for the reason that the decision made by the majority of the court, as well as by the special term was afterwards reversed by the Court of Appeals.¹ There was accordingly no infringement of the law in what the defendant himself, in the manner, stated he had said, nor by what he afterwards conceded to have been his additional statement. And no harm, therefore, could have resulted to him from what he admitted to have been his remarks at the meeting.

The verdict has been objected to as against the weight of the evidence. This objection has been raised upon the fact that four witnesses besides the defendant testified that they were present at the time when the money was demanded by him from Mr. Popkin, and that he demanded the money not for himself, but to distribute or divide among the persons who had been out of employment during the period of the strike. Further evidence was given by two witnesses sworn on behalf of the defendant as to statements made by Mr. Popkin, but there was no extortion in obtaining the money. This, however, was denied by Popkin, and in effect also by his wife, who was present at one of the conversations. Further testimony was also given to prove that the defendant had a good reputation among those who knew and had business intercourse with him. And from the proof as it appears by the case, there was certainly sufficient, if the jury had credited the statements of the witnesses, to secure the defendant's acquittal. But this court, not having the advantage of seeing the witnesses and listening to the statements and observing their manner as the jury did, cannot, on that account, assume that the verdict was not in accordance with the evidence. It will often occur that witnesses may unite in their evidence, as those did so on the part of the defendant when the jury, from their conduct or appearance upon the stand, will fail to be impressed with the truthfulness of their statements. And the court, upon an appeal, where the evidence may be in that manner rejected, is not at liberty to say that

¹*Thomas v. Musical Mut. Prot. Union*, 8 L. R. A. 175, 121 N. Y. 45.

the jury have erred as long as they had sufficient evidence before them on the part of the prosecution to justify their verdict.

On this subject it has been said, that "when there is evidence on both sides and the case is balanced and the mind of the court has been called upon to waive conflicting statements and inferences, and decide upon the credibility of opposing witnesses, much weight must be accorded to the special adaption of the trial court to investigate and determine such questions. Any other rule would nullify the peculiar advantages which that tribunal possesses, in observing the manner and appearance of the witnesses produced, and the various physical and mental peculiarities by which the mind of the professional observer determines the degree of credit which ought prudently to be attached to oral testimony." *Baird v. New York*, 96 N. Y. 567, 577. And this principle requires the conclusion of the jury as it has been expressed by their verdict to be adopted and maintained by the court, unless the preponderance of evidence is so great as to indicate either a misunderstanding of the case, or the influence of prejudice, passion or corruption. Present cannot be held to be of that description. It was, in the opinion of *Judge Daniels*, entirely proper for the consideration and decision of the jury, and their verdict can not be set aside as opposed to the weight of the evidence. The judgment, on the contrary, is fully supported by the case as it was presented on the part of the prosecution, notwithstanding the evidence produced in favor of the defendant, and it should be affirmed.

In the fall of 1885 a general strike among the coal miners was inaugurated along the valley of the Monongahela River, and a number of miners working for Neel and other coal operators refused or failed to go out with the other miners upon the strike and continued to work for their employers. The effect was that the strike was a partial failure. It was then determined to make an effort to get these workers to join the strike, and a meeting of miners was held in Monongahela City and a vigilance committee was appointed to accomplish this, and public meetings were held in California and Coal Centre in November, at which resolutions were adopted favoring peaceful means and measures, and inviting the miners in the lower pools—the first, second and third pools—to come up into the fourth pool, and assist them in inducing these

workers to come out and join the strike. As a result, on the 25th and 27th days of November, a steamboat called "The Stella" came up the river and landed at Luceyville, or Roscoe, near the mines. Quite a number of men, some two hundred, from the lower pools, were brought to the fourth pool on this boat. During the time the boat remained at these points there was some violence used and several men were beaten, and some of the unoccupied shanties belonging to Neel were stoned and broken in. The parties who engaged in these acts of violence were convicted of conspiracy. On the trial the jury were told that if they believed from the evidence that large bodies of men were collected about the coal works of Neel and other coal operators, named in the indictment, by previous arrangement or concerted action, with the intention of intimidating the miners working, by the presence of great numbers of persons opposed to the course pursued by said working miners, such combination would be unlawful, and all persons engaged therein would be guilty of conspiracy, whether actually present at the commission of any act of violence or not. This charge was given, after proof that the means to be used by the committee, as it appeared from the resolutions passed, were of a peaceful and lawful character, and under no circumstances did the convention or the committee it appointed countenance the use of force or other unlawful means or methods to accomplish the end in view. These instructions were affirmed on appeal.¹

So in a civil action in 1887 in Michigan for damages against a defendant who was the acknowledged leader of a gang of men and who knew its character and intent when he led it upon the premises of the plaintiff, for the purpose of inducing the plaintiff's employes to join the men already gathered in a strike for ten hours, he was held responsible for the acts of violence of the mob notwithstanding he halted them 200 feet from the plaintiffs' mill and told them to remain there until he came back. It was said that whatever right the defendant had to influence the men to quit work unless the 10-hour demand was acceded to by their employer, while they were not at work, he had no right to enter upon the premises of such employer to influence the men while they were

¹*Newman v. Com.* (Pa.) 5 Cent. Rep. 497.

at work. If, by custom, license is impliedly given to all persons to enter places of business, that license is nevertheless considered revoked the moment the person so entering interferes unlawfully with the rights of the proprietor. He then becomes a trespasser *ab initio*, and must suffer the consequences of his ill-advised and unlawful entry.¹

When an association is formed for innocent purposes, and its power and authority are afterwards abused, only those so abusing them are liable.²

Under the New York Statute, persons styling themselves the "Executive Board of the Ocean Association of the Longshoremen's Union," not in plaintiff's employ, who procured its workmen to quit in a body and afterwards declared a boycott on its business, to compel it to pay the wages demanded by them, were held guilty of illegal and actionable acts and were liable to arrest.³ It was declared that all combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex or annoy them in working or in obtaining work, because they are not members, or in order to induce them to become members, or designed to prevent employers from making a just discrimination in wages paid to the skillful and the unskillful, to the diligent and the lazy, to the efficient and the inefficient, and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which such business shall be conducted, by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights, are illegal combinations or associations, and all acts done in furtherance of such intentions by such means and accompanied damage, are actionable. Associations have no more right to inflict injury upon others than individuals have.

¹ *Webber v. Barry*, 9 West. Rep. 872, 66 Mich. 127; *McGehee v. State*, 23 Tex. App. 830.

² *Carew v. Rutherford*, 106 Mass. 10. See *Snow v. Wheeler*, 113 Mass. 186; *Eoven v. Matheson*, 14 Allen, 503.

³ *Old Dominion S. S. Co. v. McKenna*, 24 Blatchf. 244, 30 Fed. Rep. 43.

Associations of men may endeavor peaceably, and in a reasonable manner, to persuade others to cease or abstain from work; but if by force or intimidation they endeavor to control the free agency or overcome the free will of their fellow workmen, they become guilty of a penal offense.¹ The law encourages combinations for good, and combinations of workmen to better their condition by legitimate and fair means are commendable and should be encouraged. But combinations for evil purposes, whether by one class of men or another, are detrimental to the public weal, and cannot be regarded with favor by the courts.²

In *Com. v. Sheriff*, 15 Phila. 393, the court held it not unlawful to notify employers that a trade union association had decided upon an increase of wages to journeyman printers, and unless such increase was paid a strike would be declared. The increase being refused a strike was declared, and the court excused the invasion of the employers' premises to induce the workmen to strike, on the ground that it was a place of business and the employers did not expressly forbid it, and that the foreman, a member of the trade union, was present, and as far as he represented his employer might be held to consent. In that case only peaceful means were used. But the ruling can hardly be sustained, on legal principles, for the law will not imply authority to enter premises, open to the public for purposes of business only, where the object of the person who enters is to injure the business of the proprietor.³ Even in a railway station the implied right of entry is limited to those having business with the railroad company, and it must be exercised consistently with the interests of the railroad, and a traveler can only enter a reasonable time prior to the departure of his train.⁴

¹*Reg. v. Shepherd*, 11 Cox, C. C. 325.

²*State v. Glidden*, 8 New Eng. Rep. 849, 55 Conn. 46. And the rule applies to corporations guilty of conspiracy *Wayne Pike Co. v. Hammons* (Ind.) 27 N. E. 487; *Buffalo Lubricating Oil Co. v. Standard Oil Co.* 42 Hun, 153, 8 Cent. Rep. 667, 106 N. Y. 669; *Krulevitz v. Eastern R. Co.* 2 New Eng. Rep. 37, 140 Mass. 573; *Western News Co. v. Kilmartin*, 83 Kan. 510; *Morton v. Metropolitan L. Ins. Co.* 34 Hun, 366, 4 Cent. Rep. 397, 103 N. Y. 645.

³*Webber v. Barry*, 9 West. Rep. 872, 66 Mich. 127; *New York, L. E. & W. R. Co. v. Wenger*, 17 Week. L. Bull. 306.

⁴*Harris v. Stevens*, 81 Vt. 79.

But while excusing the unlawful entry, the court took care to condemn the resort to threats and menace of injury to persons or property, in the enforcement of a demand for an advance of wages.

§ 77. **Present Condition of the Law Concerning Trade or Labor Combinations, "Picketing," "Boycotting."**—It may be accepted then as the common law in this country, and this is not changed by state statutes, but they are simply declaratory of existing law, that the labor and skill of the workman, the plant of the manufacturer, the experience and equipment of the farmer, and the learning and reputation of the professional and expert, are in equal sense property. The possessors of such property, whether employers or employed, may combine in trade unions or associations, or otherwise, to advance the value of their property and their interests by lawful means, including the refusal to extend competition among workmen, by admitting apprentices to learn trades.¹ They may use arguments and persuasion to induce others to unite in such combination.

Even "picketing," which means watching and speaking to the workmen, as they go to or return from their employment, to induce them to leave the service, is not necessarily unlawful; nor is it unlawful to use terms of persuasion towards them to accomplish that object, but if the besetting and watching is carried to such an extent that it occasions a dread of loss, it is unlawful.²

Men may assemble for a lawful purpose, to discuss questions for any lawful purpose; but no man or body of men can lawfully go upon the premises of an employer and seek to induce the employés to cease work. The very show of numbers, unaccompanied by actual or threatened violence is, in many cases, under existing circumstances, intimidation. The courts will, in such case, interpose by injunction against those attempting such interference, for the remedy by action of trespass is not sufficient in a case involving a continuous series of acts in pursuance of a plan.³

¹*Snow v. Wheeler*, 113 Mass. 186.

²*New York, L. E. & W. R. Co. v. Wenger*, 17 Week. L. Bul. 306; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Stanton v. Allen*, 5 Denio, 484.

³*New York, L. E. & W. R. Co. v. Wenger*, 17 Week. L. Bul. 306; *Reg. v. Hibbert*, 13 Cox, C. C. 82; *Reg. v. Bauld*, 13 Cox, C. C. 282.

But an action of trespass will also lie.¹

Workmen stand upon the same broad level of equality before the law with all other vocations, professions, or callings, respecting the disposition of their labor and the advancement of their associated interests. It is unlawful for employers to wrongfully to coerce, intimidate, or hinder the free choice of workmen in the disposal of their time and talents. It is unlawful for workmen wrongfully to coerce, intimidate, or hinder employers in the selection of such workmen as they choose to employ. No employer can say to a workman he must not work for another employer; nor can a workman say to an employer he cannot employ the service of another workman. Every man is at liberty to enter into a combination to keep up the price of wages, but if he enters into a combination for the object of interfering with the perfect freedom of action of another man, it is an offense at common law.²

A combination of employes whose aim it is to dictate to an employer whom he should discharge from his employ is unlawful, as an unwarrantable interference with the conduct of his business.³

A letter written by a "chairman" of an organized body to an employé in a shop that he might remain in it to do a particular kind of work, but to confine himself to work designated by the writer, is an unwarrantable interference with the business.⁴

It is an indictable conspiracy for several employes to combine and notify their employer that, unless he discharges certain enumerated persons, they will in a body quit his employment.⁵

¹ *Walker v. Cronin*, 107 Mass. 555; *Carew v. Rutherford*, 106 Mass. 1; *Buffalo Lubricating Oil Co. v. Standard Oil Co.* 8 Cent. Rep. 687, 106 N. Y. 689; *Buffalo Lubricating Oil Co. v. Everest*, 80 Hun, 586; *Johnston Harvester Co. v. Meinhardt*, 9 Abb. N. C. 898; *Mapstrick v. Romge*, 9 Neb. 890; *Haskins v. Royster*, 70 N. C. 601; *Baughman v. Richmond Typographical Union*, 11 Va. Law Journal (April, 1887), 196; *Jones v. Blocker*, 48 Ga. 881; *Payne v. Western & A. R. Co.* 18 Lea, 507.

² *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551.

³ *State v. Donaldson*, 32 N. J. L. 155; *Re v. Ferguson*, 3 Stark. 489; *Re v. Ryckerdike*, 1 Mood. & R. 179.

⁴ *Re Wabash R. Co.* 24 Fed. Rep. 220.

⁵ *State v. Donaldson*, 32 N. J. L. 155, following *State v. Norton*, 23 N. J. L. 44, and disapproving *State v. Rickey*, 9 N. J. L. 364; *Old Dominion S. S. Co. v. McKenna*, 24 Blatchf. 244, 30 Fed. Rep. 48.

Where shoemakers combine, agreeing not to work for anyone who employs men working below the standard of wages fixed by themselves, the combination is void.¹

Where penalties are prescribed by a trades union to be paid by employers for violation of its rules in order to secure immunity from interference, it is illegal.²

Rules which provide that no member shall call at any shop, where a dispute has arisen, and for reference to the executive council of such dispute, are illegal.³

So an association formed under a rule which provides that a member binding his son in a shop where non-union men are employed should be fined, is illegal.⁴

Displaying banners with devices as a means of threat and intimidation to prevent others from entering into a person's employment will be restrained by injunction at the suit of the employer.⁵

The reports, English and American, are full of illustrations of the doctrine that a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute; or to effect a legal purpose, by illegal means, whether such means be illegal at common law or by statute, is a common law conspiracy. Such combinations are equally illegal whether they promote objects or adopt means that are *per se* indictable, or promote objects or adopt means that are *per se* oppressive, immoral, or wrongfully prejudicial to the rights of others. If they seek to restrain trade, or tend to the destruction of the material prosperity of the country, they work injury to the whole public. These propositions are the

¹*People v. Fisher*, 14 Wend. 9; *The Cordwainer's Case*, 1 Yates, Sel. Cas. 112; *People v. Trequier*, 1 Wheeler, Crim. Cas. 142.

²*Carew v. Rutherford*, 106 Mass. 1.

³*Hornby v. Close*, L. R. 2 Q. B. 158.

⁴*Rigby v. Connol*, L. R. 14 Ch. Div. 482; *Hornby v. Close*, L. R. 2 Q. B. 158.

⁵*Sherry v. Perkins*, 6 New Eng. Rep. 561, 147 Mass. 212; *Walker v. Cronin*, 107 Mass. 555; *Gilbert v. Mickie*, 4 Sandf. Ch. 357, 7 L. ed. 1132; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551; *Boston Distile Co. v. Florence Mfg. Co.* 114 Mass. 69; *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. 142; *Saxby v. Easterbrook*, L. R. 3 C. P. Div. 339; *Hermann Loog v. Bean*, L. R. 26 Ch. Div. 306; *Thorley's Cattle Food Co. v. Massam*, L. R. 14 Ch. Div. 763; *Thomas v. Williams*, L. R. 14 Ch. Div. 864; *Hill v. Hart-Davies*, L. R. 21 Ch. Div. 798; *Dry v. Brownrigg*, L. R. 10 Ch. Div. 294; *Gaskin v. Balls*, L. R. 13 Ch. Div. 824.

clear deduction of the cases, and breathe the spirit of equality and justice.

The principle upon which the cases, English and American, proceed, is that every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. The labor and skill of the workman, or the professional man, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all, in equal sense, property. If men by overt acts of violence destroy either, they are guilty of crime. The anathemas of a secret organization of men combined for the purpose of controlling the industry of others by a species of intimidation that works upon the mind, rather than the body, are quite as dangerous, and generally altogether more effective than acts of actual violence. And while such conspiracies may give to the individual directly affected by them a private right of action for damages, they at the same time lay a basis for an indictment, on the ground that the State itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings. The good order, peace, and general prosperity of the State are directly involved in the question.

The exposure of a legitimate business to the control of an association that can order away its employes, and frighten away others that it may seek to employ, and thus compel it to cease the further prosecution of its work, is a condition of things utterly at war with every principle of justice, and with every safeguard of protection that citizens under our system of government are entitled to enjoy. The direct tendency of such intimidation is to establish over labor and over all industries a control that is unknown to the law, and that is exerted by a secret association of conspirators, that is actuated solely by personal considerations, and whose plans, carried into execution, usually result in violence and the destruction of property.

That evils exist in the relations of capital and labor, and that workmen have grievances that oftentimes call for relief, are facts

that observing men cannot deny, but the remedy cannot be found in secret conspiracies nor in the boycott.¹

Indeed the essential and criminal idea of "boycotting" is a confederation, generally secret, of many persons whose intent is to injure another by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators.²

Trade conspiracy frequently contemplates boycotting as a means to the end sought, that is the coercion of the party conspired against. The word is not easily defined. It is frequently spoken of as passive, merely,—a let-alone policy, a withdrawal of all business relations, intercourse, and fellowship. If that is its only meaning, the individual withdrawal of patronage, it will be difficult to find anything in it criminal. We may gather some idea of its real meaning, however, by a reference to the circumstances under which the word originated. Those circumstances are thus narrated by Mr. Justin H. McCarthy, an Irish writer of learning and ability, who will be recognized as good authority. In his work entitled "England under Gladstone," he says: "The strike was supported by a form of action, or rather inaction, which soon became historical. Captain Boycott was an Englishman, an agent of Lord Earne, and a farmer of Lough Mask, in the wild and beautiful district of Connemara. In his capacity as agent he had served notices upon Lord Earne's tenants, and the tenants suddenly retaliated in the most unexpected way by, in the language of schools and society, sending Captain Boycott to Coventry in a very thorough manner. The population of the region for miles around resolved not to have anything to do with him, and, as far as they could prevent it, not to allow anyone else to have anything to do with him. His life appeared to be in danger; he had to claim police protection. His servants fled from him as servants flee from their masters in some plague-stricken Italian city. The awful sentence of excommunication could hardly have rendered him more helplessly alone for a time; no one would work for him; no one would supply him with food.

¹*State v. Stewart*, 4 New Eng. Rep. 378, 59 Vt. 273.

²*Crump v. Com.* 84 Va. 927; *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476; *Reg. v. Parnell*, 14 Cox, C. C. 508; *State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 46.

He and his wife had to work in their own fields themselves, in most unpleasant imitation of Theocritan shepherds and shepherdesses, and play out their grim eclogue in their deserted fields, with the shadows of the armed constabulary ever at their heels. The Orangemen of the north heard of Captain Boycott and his sufferings, and the way in which he was holding his ground, and they organized assistance and sent him down armed laborers from Ulster. To prevent civil war, the authorities had to send a force of soldiers and police to Lough Mask, and Captain Boycott's harvests were brought in, and his potatoes dug, by the armed Ulster laborers, guarded always by the little army."¹

But whenever courts of law have made use of the term "boycotting," they have applied it to some phase of conspiracy; as a combination and agreement among defendants, owners of steamers, with intent to injure plaintiffs and prevent them from obtaining cargoes for their steamers between ports, agreeing to refuse, and refusing, to accept cargoes from shippers, except upon terms that shippers could not ship by plaintiff's steamers, and threatening to stop shipment of homeward cargoes altogether, which threats they carry into effect."

The agreement with keepers of particular boarding-houses not to ship sailors at the offices of certain notaries is a conspiracy, it is boycotting."

To incite persons to prevent others from taking or occupying farms from which others have been evicted for nonpayment of rent is an offense at common law. A combination to prevent persons buying goods taken in execution is an offense at common law, and is a crime, if the means to carry out these incitements were those commonly known as boycotting."

Every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy, whether the means employed are actual violence or a species of intimidation that works upon the mind."

¹*State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 46.

²*Mogul S. S. Co. v. McGregor*, L. R. 15, Q. B. D. 476.

³*Emanuel's Case*, 6 City Hall Rec. 83.

⁴*Reg. v. Parnell*, 14 Cox, C. C. 508.

⁵*State v. Stewart*, 4 New Eng. Rep. 378, 59 Vt. 273.

§ 78. **Indictments for Conspiracy.**—Generally the conspiracy is indictable as a common law offense, when such offenses are recognized as existing at common law.¹

A conspiracy to commit an abortion is not a felony at common law.²

In states where common law crimes are recognized, the legislation on the subject of conspiracy does not usually abolish the common law offense.³ The venue where any act in giving effect to the conspiracy was performed by any member of the confederation, may be the place selected for bringing the indictment against all the parties concerned in the conspiracy.⁴

In stating the object of a conspiracy in an indictment, the same certainty and strictness are not required as in the case of an indictment for the offense conspired to be committed.⁵

A general allegation that two or more person conspired to effect an object criminal in itself—as to commit a misdemeanor or felony—is sufficient, even although the indictment omit all charges of the particular means to be used,⁶ and the cases are now equally uniform in holding that if the agreement or combination be to do an act or to effect an object not criminal, by the use of unlawful means, a general charge of a conspiracy to effect the object is not sufficient, and the charge of such a conspiracy must be accompanied with a particular statement of the means by which the object of the conspiracy was to be effected, so that these means may appear to be criminal, or the indictment will be bad.⁷

It is only necessary to set forth the specific means intended to be employed, when the act to be done is itself lawful, but the

¹*State v. Norton*, 23 N. J. L. 83; *Com. v. Hunt*, 4 Met. 111; *State v. Pulls*, 12 Minn. 164.

²*Scott v. Eldridge* (Mass.) 12 L. R. A. 379; *Com. v. Demain*, Brightly, 441; *Reg. v. Banks*, 12 Cox, C. C. 393; *State v. Jackson* (Tenn.) 12 L. R. A. 870, note.

³*State v. Norton*, 23 N. J. L. 83.

⁴*Com. v. Corties*, 3 Brewst. 575; *Rez v. Ferguson*, 2 Stark. 489.

⁵*United States v. Stevens*, 44 Fed. Rep. 132. See also *Com. v. Meseros*, 154 Mass. 64; *Moschell v. State* (N. J.) June 4, 1891; *United States v. Lancaster*, 10 L. R. A. 817, 44 Fed. Rep. 685.

⁶*State v. Kench*, 40 Vt. 113; *State v. Ormiston*, 66 Iowa, 143; *People v. Petheram*, 7 West. Rep. 392, 64 Mich. 253; *People v. Clark*, 10 Mich. 810.

⁷*State v. Stewart*, 4 New Eng. Rep. 378, 59 Vt. 273.

combination is to do it in an unlawful manner. The allegation of the means intended to be used only then becomes important in order to show the criminal or unlawful purpose.¹

When the act contemplated is unlawful in itself, the means intended to accomplish it need not be alleged.²

To wrongfully injure the person of another is at least a misdemeanor and conspiracy, for that purpose is sufficiently charged without means intended being stated.³

In charging a conspiracy to seduce a girl, it is not necessary to show the means intended to be used were unlawful or criminal.⁴

The court may direct that a bill of particulars be given, when the indictment is not sufficiently specific in its terms, but not to include the particular acts, nor the locality or date.⁵

When the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; and if the criminality of the offense which is intended to be charged, consists in the agreement to compass or promote some purpose not of itself criminal or unlawful, by the use of fraud, force, falsehood, or other criminal or unlawful means, such intended use of fraud, force, falsehood or other criminal or unlawful means must be set out in the indictment.⁶

Lambert v. People, 9 Cow. 578, decided simply that the frame

¹*People v. Richards*, 1 Mich. 216; *State v. Crowley*, 41 Wis. 271; *People v. Barkelov*, 37 Mich. 455; *Com. v. Eastman*, 1 Cush. 190; *State v. Jones*, 13 Iowa, 269; *State v. Potter*, 28 Iowa, 554; *State v. Stewart*, 4 New Eng. Rep. 878, 59 Vt. 273.

²*People v. Clark*, 10 Mich. 810; *State v. Bray*, 107 N. C. 822; *United States v. Gardner*, 42 Fed. Rep. 829; *Sydsenf v. Reg*, 11 Q. B. 245; *Reg. v. Heymann*, L. R. 8 Q. B. 102; *Latham v. Reg*, 9 Cox, Cr. Cas. 516. But in Montana the means must be stated. *Territory v. Carland*, 6 Mont. 14. And in Texas the acquisition of the property, under an indictment for swindling must be alleged. *Cannon v. State* (Tex. App.) 15 S.W. 117.

³*State v. Ormiston*, 66 Iowa, 143.

⁴*Smith v. People*, 25 Ill. 17.

⁵*Reg. v. Kenrick*, 5 Q. B. 49; *Reg. v. Brown*, 8 Cox, C. C. 69; *Reg. v. Rydroft*, 6 Cox, C. C. 76; *Reg. v. Hamilton*, 7 Car. & P. 443; *State v. Bartlett*, 30 Me. 132; *Com. v. McKisson*, 8 Serg. & R. 420; *State v. Buchanan*, 5 Harr. & J. 817; *People v. Richards*, 1 Mich. 216; *Com. v. Warren*, 6 Mass. 72; *Reg. v. Eddale*, 1 Fost. & F. 213.

⁶*Com. v. Hunt*, 4 Met. 111; 1 East, P. C. 461; 1 Stark. Crim. Pl. (2d ed.) 156; *Op. Spencer Sen.* 9, Co. 586; *Cole v. People*, 84 Ill. 216; *Smith v. People*, 25 Ill. 17; *People v. Petheram*, 7 West. Rep. 392, 64 Mich. 252; *Com. v. Shedd*, 7 Cush. 515.

of the indictment was defective in not specifying the means by which the conspiracy was to be effected.¹

When the means used are unlawful under the statute, and the purpose is unlawful at common law, the words of the statute may be used without setting forth their meaning, and it is unnecessary to state specifically the kind of threats, or methods of intimidation used.

Where the charge is that the defendants "unlawfully, fraudulently and deceitfully did conspire, combine, confederate and agree together to cheat and defraud" it is sufficient.²

The doing of an overt act must be charged, though the particular act is not set out, nor actual injury alleged, and except when the conspiracy is to cheat a particular set of persons or the public generally, the names of the persons intended to be imposed upon must be stated if known.³

In *Reg. v. Rowlands*, 17 Q. B. 671, the indictment charged a conspiracy to force workmen to quit the employment of certain persons by the use of threats and intimidation. The Statute of 6 Geo. IV., chap. 129, § 3, forbids the use of such means, and the court said: "It is objected that some counts do not disclose the nature of the molestation or intimidation by which the conspiracy was to take effect, but it is quite unnecessary." The words of the Legislature are used.⁴

The words used in the statute have a meaning stamped upon them by the Act itself, and it must be taken that they are used in the indictment in the same sense, and they are not employed as describing the substantive offense for which the indictment is preferred, as that offense consists in the conspiracy, when that is a common law offense. If the conspiracy is to commit an offense which is indictable it is sufficient to state the offense to be com-

¹*State v. Norton*, 28 N. J. L. 83.

²*Sydsorf v. Reg.* 11 Q. B. 245.

³*McKee v. State*, 9 West. Rep. 888, 111 Ind. 378; *Rez v. DeBerenger*, 8 Maule & S. 67; *Wood v. State*, 1 Cent. Rep. 441, 47 N. J. L. 461; *Com. v. Fuller*, 132 Mass. 568; *Com. v. Judd*, 2 Mass. 329; *Com. v. Andrews*, 133 Mass. 268; *Miller v. State*, 79 Ind. 198.

⁴See *Com. v. Dyer*, 128 Mass. 70; *State v. Cook*, 38 Vt. 437; *State v. Stewart*, 4 New Eng. Rep. 378, 59 Vt. 278; *State v. Jones*, 33 Vt. 443; *Reg. v. Rowlands*, 17 Q. B. 671.

mitted, in words that will describe it as a conclusion of law. The means need not be particularly set out.¹

If an act in its natural characteristics and quality is unlawful, knowledge of its wrongful character is presumed, and no averment of such knowledge is required in the indictment. But it is otherwise when the act only becomes illegal or wrongful by the presence of accidental or fortuitous features not usually attendant upon the doing of the particular thing. Thus in *State v. Carpenter*, 54 Vt. 551, the respondent was presumed to know that it was unlawful for him to assault an individual. But when the act was enlarged to the offense of impeding an officer in the discharge of his duty, it took on a character so abnormal that knowledge of this artificial quality of his act by the respondent must be alleged in order to lay a basis for the charge of a guilty intent.*

Where a statute provides for the definition and punishment of a felonious conspiracy, and for an additional punishment for any overt act of a criminal nature, which is committed in pursuance of the conspiracy, the whole being one transaction, the description, in an indictment for the conspiracy of the crime as an entirety, is necessary and proper, although such description requires the setting out of the facts constituting the separate crime.²

The offense of conspiracy may be complete without the commission of the overt act which the conspirators agreed to commit.³ But of course no civil action will lie for simply conspiring to do an unlawful act, as the act itself and resulting injury to plaintiff are the very grounds of action.⁴

Unless the statute requires that the overt act should be charged if it has been committed, it is unnecessary to do so.⁵ But it must be so alleged if the statute requires it.⁶

¹*State v. Ormiston*, 66 Iowa, 143; *Thomas v. People*, 113 Ill. 531; *State v. Noyes*, 25 Vt. 415; *State v. Bartlett*, 80 Me. 182; *State v. Ripley*, 81 Me. 386; *Hazen v. Com.* 23 Pa. 355; *People v. Bush*, 4 Hill, 138.

²*State v. Stewart*, 4 New Eng. Rep. 378, 59 Vt. 273.

³*United States v. Lancaster*, 10 L. R. A. 317, 44 Fed. Rep. 885.

⁴*Com. v. Judd*, 2 Mass. 329; *Com. v. Warren*, 6 Mass. 74; *State v. Noyes*, 25 Vt. 415; *State v. Ormiston*, 66 Iowa, 143; *State v. Buchanan*, 5 Harr. & J. 317.

⁵*Kimball v. Harman*, 34 Md. 407; *McHenry v. Sneer*, 56 Iowa, 649.

⁶*State v. Ormiston*, 66 Iowa, 143; *Com. v. Wallace*, 16 Gray, 222; *Bowen v. Matheson*, 14 Allen, 503.

⁷*State v. Norton*, 23 N. J. L. 33; *State v. Noyes*, 25 Vt. 415; *Collins v. Com.* 3 Serg. & R. 220; *Com. v. Corties*, 8 Phila. 450.

It may, indeed, be alleged in aggravation of the offense and given in evidence to prove the conspiracy.¹ Though the offense of conspiracy, even when the overt act is committed, is complete before the commission of the overt act, in the sense that nothing more is necessary to complete the crime, yet the conspiracy must be deemed to continue until the overt act is committed;² and it is a renewal of the conspiracy.³

And in every case that can be adduced of conspiracy the offense depends upon the unlawful agreement and not on the act which follows it; the latter is but the evidence of the former. The offense is therefore complete when the confederacy is made.⁴

A conspiracy is a substantive offense and punishable at common law, though nothing be done in execution of it;⁵ and all the authorities agree that the conspiracy is the gist of the offense.⁶

Under a statute declaring it a "criminal conspiracy to unlawfully and maliciously obstruct and impede the business of corporations," the indictment need not set forth that the defendants did more than conspire to do the acts.⁷

From all which it results that every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offense, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected, which means may be perfectly indifferent, and form no ingredient of the crime, and therefore need not be stated in the indictment.⁸

¹*State v. Mayberry*, 48 Me. 218.

²*Com. v. Corties*, 3 Brewst. 575.

³*State v. Chapin*, 17 Ark. 561; *Com. v. White*, 123 Mass. 430; *Johns v. State*, 19 Md. 421; *State v. Hamilton*, 18 Nev. 386.

⁴*Rex v. Spragg*, 2 Burr. 998; *Rex v. Rispal*, 3 Burr. 1321; *State v. Buchanan*, 5 Harr. & J. 817; *Collins v. Com.* 3 Serg. & R. 230; *Com. v. Judd*, 2 Mass. 337; *Com. v. Tibbetts*, 2 Mass. 538; *Com. v. Warren*, 6 Mass. 74; *People v. Mather*, 4 Wend. 259; *State v. Cawood*, 2 Stew. (Ala.) 360; *State v. Rickey*, 9 N. J. L. 364; *Com. v. M'Kisson*, 8 Serg. & R. 420.

⁵*Book of Assises Ct.* 44; *The Poulterers Case* (1611) 9 Rep. 55, Moore, 814; *Rex v. Edwards* (1725) 1 Strange, 707, 1 Sess. Cas. 886, 8 Mod. 320; *Rex v. Eccles* (1783) 1 Leach, C. C. 274; *Rex v. De Berenger*, 8 Maule & S. 68; *Rex v. Gill* (1818) 2 Barn. & Ald. 204.

⁶*Rex v. Journeyman Tailors*, 8 Mod. 11.

⁷*People v. Petheram*, 7 West. Rep. 502, 64 Mich. 253.

⁸*Rex v. Eccles* (1783) 1 Leach, C. C. 274; *Rex v. Gill* (1818) 2 Barn. & Ald. 204.

In punishing a conspiracy, not carried into execution, the law does not punish a mere unexecuted intention. It is the act of conspiring, not the mere intention to do this. Until the conspiracy is formed, it is mere individual intent and not punishable. But when it is formed, each individual intent has been united in one common purpose, and a new element of danger to social order has sprung into existence; an element whose essence is union, and which in turn is met by the united force of the civil and criminal law. The individual must rely on individual effort to protect himself from individual falsehood, fraud and malice, and when he fails he may resort to the civil law to redress his civil wrongs, but against concerted fraud, falsehood and malice the law interposes to avert the intended blow, and arrests the conspirators before the consummation of the proposed purpose. The act of conspiring is like that of unlawful assembling. The act of assembling to do an unlawful act is a crime, though no other act but the meeting together for such purpose is shown.

The intention of any number of men acting separately, so long as they do nothing, is not a crime of which the law will take cognizance; but when several men form the intent and come together, and agree to carry it into execution, the conspiracy as generally defined by statute is completely formed. The combination then becomes dangerous and subversive of the rights of others, and the law declares it a crime.¹ The least degree of consent or collusion between parties to an illegal transaction makes the act of one the act of the others.² But a mere presence on the occasion of the conspiracy is not sufficient to make one guilty. One must incite, procure, or encourage the act;³ but if one join the conspiracy after it is formed, he becomes a co-conspirator, and the acts of others become his acts by adoption.⁴ But that two conspired to do an act so that a third person would commit a felony, does not sufficiently charge that the purpose of conspiring to do the act was to induce the third party to commit it.⁵

¹*State v. Glidden*, 8 New Eng. Rep. 849, 55 Conn. 46.

²*State v. Anderson*, 92 N. C. 782.

³*Evans v. People*, 90 Ill. 384; *People v. Stevens*, 68 Cal. 113.

⁴*United States v. Johnson*, 26 Fed. Rep. 682.

⁵*Com. v. Barnes*, 182 Mass. 242.

The consummated conspiracy should be so alleged when the facts will sustain the charge, and not the mere conspiracy to commit the offense.¹

The charge of conspiracy cannot be aided by averment of acts done by one or more of the conspirators where the conspiracy itself is not sufficiently charged.²

But there need not be a detailed statement of the connection between the act alleged to be done and the conspiracy itself.³ The charge that a conspiracy existed to obstruct justice by divers false pretenses and devices, is sufficient where it is followed by an allegation that defendants have prevented the trial of the cause.⁴

All are charged as principals in a statutory conspiracy unless otherwise charged as guilty in a less degree.⁵

Where the counts in an indictment cover the same identical acts, the divers felonies charged, or misdemeanors and felonies may be joined,⁶ and where it appears that but one transaction forms the basis of the different counts, the intent is manifest that but one crime is charged.⁷ While reference will not be tolerated from one count to another, but the offense must be fully stated in each;⁸ yet a verdict has been held to cure this defect.⁹

If it is intended to charge several illegal acts, the facts as to each may be stated in separate counts.¹⁰ The indictment may charge the conspiracy as the substantive offense, or the conspiracy

¹*Reg. v. Boulton*, 12 Cox, C. C. 87; *State v. Clary*, 64 Me. 369; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Reg. v. Selsby*, 5 Cox, C. C. 495, note; *United States v. Gardner*, 42 Fed. Rep. 829.

²*United States v. Britton*, 108 U. S. 199, 27 L. ed. 698; *United States v. Watson*, 17 Fed. Rep. 145.

³*United States v. Donau*, 11 Blatchf. 168.

⁴*Schucab v. Mabley*, 47 Mich. 572. See also *United States v. Gardner*, 42 Fed. Rep. 829.

⁵*United States v. Bayer*, 18 Nat. Bankr. Reg. 88, 400; *Com. v. Gannett*, 1 Allen, 7; *Thornton v. State*, 25 Ga. 303.

⁶*State v. Stewart*, 4 New Eng. Rep. 378, 59 Vt. 273.

⁷*Leslie v. Com.* 82 Ky. 250; *State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 46.

⁸*State v. Norton*, 23 N. J. L. 83.

⁹*Reg. v. Aspinall*, L. R. 1 Q. B. Div. 780.

¹⁰*State v. Kennedy*, 63 Iowa, 197.

may be charged in counts which are joined with counts for the substantive crime.¹

§ 79. **Evidence in Conspiracy.**—Conspiracy is in its nature a joint offense, and cannot, either under common law or under statute, be committed by one alone; but the proof must show that two or more persons were engaged in the offense.²

An action for a conspiracy will not therefore lie against a husband and wife alone, as they are in law one person.³ Although if a man and woman marry in the name of another for the purpose of raising a specious title to the estate of the person whose name is assumed, it is a conspiracy.⁴

As soon as the union of wills for the unlawful purpose is perfected, the offense under the usual statutory definition of the crime of conspiracy is complete. This joint assent of minds may be established by facts and circumstances, and by even slight evidence of collusion, or by circumstantial evidence. Evidence of a conspiracy between two persons to commit an assault upon another is not essential to the conviction of one who does not strike the blow, when he was present prepared to assist, and did in fact interfere by jumping upon the assailed person and seizing him, so that it required two men to pull him off.⁵

An agreement, to constitute a conspiracy, need not be expressed in words, but may be gathered from the conduct of the parties.⁶

The agreement itself is an act in advancement of the intent of each.⁷

¹*Burk v. State*, 2 Harr. & J. 426; *State v. Gaffney*, 1 Rice, L. 481; *State v. Boise*, 1 McMill. L. 190; *State v. Montague*, 2 McCord, L. 257; *Harman v. Com.* 12 Serg. & R. 69; *State v. Coleman*, 5 Port. (Ala.) 82.

²4 Bl. Com. 137; *Pollard v. Evans*, 2 Show. 50; *Evans v. People*, 90 Ill. 384; *State v. Christianbury*, 44 N. C. 48; *Com. v. Manson*, 2 Ashm. 81; *Com. v. Irwin*, 8 Phila. 380.

³*Kirtley v. Deck*, 2 Munf. 15.

⁴*Rex v. Robinson*, 1 Leach, C. C. 37.

⁵*State v. Gooch*, 105 Mo. 392.

⁶*United States v. Logan*, 45 Fed. Rep. 872; *Spies v. People*, 10 West. Rep. 701, 122 Ill. 1; *State v. Wolcott*, 21 Conn. 281; *Riehl v. Evansville Foundry Assn.* 1 West. Rep. 885, 104 Ind. 70; *Kelley v. People*, 65 N. Y. 566; *McDowell v. Russell*, 87 Pa. 164; *Evans v. Matson*, 56 Pa. 54; *Orary v. Sprague*, 12 Wend. 41; *Archer v. State*, 4 West. Rep. 726, 106 Ind. 426; *Rex v. Cope*, 1 Strange, 144; *Rex v. Parsons*, 1 W. Bl. 393.

⁷*Mulcahy v. Reg.* L. R. 8 H. L. 306, Ir. Q. B. 1 Ir. R. C. L. 18; *United States v. Stevens*, 44 Fed. Rep. 132.

In criminal law no overt act is necessary to constitute the offense.¹ Concurrence of sentiment and co-operative conduct in a criminal enterprise, and not formality of speech, are the essential ingredients of a criminal conspiracy.²

To constitute conspiracy the combination must be corrupt.³ It must be a joint, malicious and willful common purpose.⁴

Statutes have been passed in various states to prevent and punish a course of proceeding not defined at the common law, and of comparatively recent origin; to punish all unlawful interference with the business of another, when such interference is shown to be willful and malicious, although the act is not inspired, as in the common law offense, by any particular wantonness, cruelty, or revenge against the owner of the property, but to obstruct the business of others that the conspirators may gain thereby some advantage or profit to themselves.

In Michigan a statute declares that "if two or more persons shall willfully and maliciously combine or conspire together to obstruct or impede by any act, or by means of intimidation, the regular operation or conduct of the business of any railroad company, or any other corporation, firm, or individual of this State, or to impede, hinder or obstruct, except by due process of law, the regular running of any locomotive, engine, freight or passenger train on any railroad, or the labor and business of any such corporation, firm or individual, such persons shall, on conviction thereof, be punished," etc.⁵

Under this statute, malice against the owner of the business disturbed, or his property, is not required to be shown in the same sense as does the common law in cases of malicious mischief.⁶

Where a party is shown to have acted conjointly with others,

¹*Com. v. Eastman*, 1 Cush. 228; *State v. Ripley*, 81 Me. 388; *Lambert v. People*, 9 Cow. 625; *State v. Wilson*, 30 Conn. 507; *Alderman v. People*, 4 Mich. 414; *State v. Keach*, 40 Vt. 113.

²*Archer v. State*, 4 West. Rep. 726, 106 Ind. 426-432; *McKee v. State*, 9 West. Rep. 840, 111 Ind. 378.

³*Wood v. State*, 1 Cent. Rep. 441, 47 N. J. L. 461; *People v. Flack*, 11 L. R. A. 807, 125 N. Y. 324.

⁴*People v. Petheram*, 7 West. Rep. 592, 64 Mich. 252.

⁵How. Stat. § 9275.

⁶*People v. Petheram*, 7 West. Rep. 592, 64 Mich. 252; *McCartney v. Berlin* (Neb.) Feb. 18, 1891.

he cannot complain if he is charged with having conspired with them in producing the results, even though the names of his co-conspirators are unknown.¹

Where a number of persons combine with a common design to do an unlawful act to which the ordinary law of conspiracy applies, the acts and declarations of each, done in furtherance of the common design, are the acts and declarations of all.² Each conspirator is responsible for everything done by his confederates which follows on the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan.³

When men combine to do an unlawful thing, and in the prosecution of their intent one goes a step beyond the rest of the party, and does acts which they do not perform, all are responsible for what he does; but there should be shown some concert of agreement—an agreement to do some unlawful thing.⁴ But if the act is not the natural and probable outcome of the common design, but is the independent act of some of the party, outside of the common purpose, the others are not responsible for it.⁵

When an unlawful act agreed to be done is not of a dangerous or homicidal character, or its execution does not necessarily or probably require the use of such force or violence as may naturally or probably produce death, and a person is killed by one of the conspirators while such act is being done, such killing is regarded by the law as collateral to the conspiracy to commit the other crime; and he only who does the killing is liable for such killing.⁶

Each conspirator is responsible only for things done by his confederates which follow incidentally in the execution of the common design, as its natural consequence. But it is not admis-

¹*People v. Mather*, 4 Wend. 229; *Rex v. Steel*, 2 Moody, Crown Cas. 246.

²*Spies v. People*, 10 West. Rep. 701, 122 Ill. 1. All of a series of forged notes may be exhibited to show the plan of the conspiracy in their issuance. *Cord v. State*, 7 West. Rep. 81, 109 Ind. 415. "Acts" embraces instrument of writing, printed matter and everything done to carry forward the conspiracy. *Spies v. People*, 10 West. Rep. 701, 122 Ill. 1.

³*Bowers v. State*, 24 Tex App. 542; *State v. McCahill*, 72 Iowa, 111; *Lusk v. State*, 64 Miss. 845; *Gibson v. State*, 89 Ala. 121.

⁴*United States v. Kane*, 28 Fed. Rep. 748.

⁵*Lusk v. State*, 64 Miss. 845.

⁶*United States v. Boyd*, 45 Fed. Rep. 851.

sible to prove acts or declarations of co-conspirators not tending to accomplish the common purpose.¹

An agreement to commit a robbery is an agreement to do such an act that if a person is killed in the execution of it all who are in the conspiracy to rob, and are aiding in executing it at the time of the killing, are guilty of murder; for the crime of robbery is homicidal in its character.²

When the means are not specifically agreed upon, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose.³

One engaged in a conspiracy to mob prisoners in custody of the law is none the less liable to punishment because he went with the prisoners as guard or was an officer in charge of them.⁴

The same rule as to the admission of acts or declarations of one conspirator applies in civil as well as in criminal cases.⁵

When a conspiracy is charged between two or more, the acts of one person engaged in the conspiracy are the acts of all the conspirators, and may be alleged in the declaration as the individual acts of the one.⁶

When several persons take part in the execution of a criminal purpose, all are equally liable for the acts of each, and for the incidental and probable consequences of the joint purpose.⁷

¹*Long v. State*, 18 Tex. App. 311; *U. S. v. Gunnell*, D. C. 3 Cent. Rep. 784; *State v. Kirkpatrick*, 42 Fed. Rep. 639; *State v. Fredericks*, 85 Mo. 145; *Strout v. Packard*, 76 Mo. 148.

²*United States v. Boyd*, 45 Fed. Rep. 851.

³*Spies v. People*, 10 West. Rep. 701, 123 Ill. 1.

⁴*United States v. Logan*, 45 Fed. Rep. 872.

⁵*Smith v. Freeman*, 71 Ind. 85; *Hogue v. McClintock*, 76 Ind. 205; *Wolfe v. Pugh*, 101 Ind. 298; *Daniels v. McGinnis*, 97 Ind. 549; *Card v. State*, 7 West. Rep. 81, 109 Ind. 415.

⁶*Booker v. Puyear*, 27 Neb. 346.

⁷*Frank v. State*, 27 Ala. 37; *Thompson v. State*, 25 Ala. 41; *People v. Woodward*, 45 Cal. 293; *Griffin v. State*, 26 Ga. 498; *Hanna v. People*, 86 Ill. 243; *Brennan v. People*, 15 Ill. 511; *Williams v. People*, 54 Ill. 422; *Williams v. State*, 47 Ind. 563; *Com. v. Campbell*, 7 Allen, 541; *Com. v. Knapp*, 9 Pick. 496; *People v. Knapp*, 26 Mich. 112; *Green v. State*, 13 Mo. 382; *Norton v. People*, 8 Cow. 137; *Ruloff v. People*, 45 N. Y. 213; *Carrington v. People*, 6 Park. Crim. Rep. 336; *Com. v. Neills*, 2 Brewst. 553; *Com. v. Daley*, 2 Pa. L. J. 361; *Breese v. State*, 12 Ohio St. 146; *Com. v. Hars*, 2 Pa. L. J. 467; *Moody v. State*, 6 Coldw. 299; *Berry v. State*, 4 Tex. App. 492; *United States v. Ross*, 1 Gall. 624; *Miller v. State*, 25 Wis. 384; *Reg. v. Hilton*, 5 U. C. L. J. 70; *Reg. v. Slavin*, 17 U. C. C. P. 205; *Rez v. Lockett*, 7 Car. & P. 300; *Rez v. Passey*, 7 Car. & P. 232; *Reg. v. Cruise*, 8 Car. & P. 541; *Reg. v. Howell*, 9 Car. & P. 437; *Rez v.*

It is immaterial at what time one charged with the conspiracy to commit a crime is shown to have entered the conspiracy.¹

Each person who joins a conspiracy at any time, whether at its inception or afterwards, becomes liable for all that is done at any time, in the prosecution of the conspiracy, to effect its unlawful object.²

It is not necessary that the accused should have been the original contriver of the mischief for he may become a companion in it by assisting the others while it is being executed.³

When persons knowingly promote and participate in an unlawful scheme to advance the price of a commodity, they are all principals, although one of them acts in some respects in subordination to the others, and is to profit less than the others, or not at all.⁴

Everyone who enters into a common purpose or design is generally a party in law to every act which may afterwards be done by any of the others or which had been before done in furtherance of such common design.⁵

Evidence of acts or statements of co-conspirators are admissible against one sought to be convicted of a felony by evidence of a conspiracy, only when they were performed or made at times the proof permits of a belief that a conspiracy existed and when they might have been in furtherance of the common design.⁶

An information which alleges that the defendants conspired to threaten and use means (the boycott) to intimidate a publishing

Higgins, 2 East, 5; *Duffey's Case*, 1 Lew. 194; *Ree v. Hodgson*, 1 Leach, C. C. 7; *Reg. v. Taylor*, L. R. 2 C. C. 147; *Ree v. Standley*, Russ. & R. 805, 1 Hale, P. C. 439, 462, 2 Hawk. P. C. chap. 29, § 8.

¹*Smith v. State*, 21 Tex. App. 96.

²*United States v. Logan*, 45 Fed. Rep. 872.

³*Spies v. People*, 10 West. Rep. 701, 122 Ill. 1.

⁴*Leonard v. Poole*, 4 L. R. A. 722, 114 N. Y. 371.

⁵*Card v. State*, 7 West. Rep. 82, 109 Ind. 415; *McKee v. State*, 9 West. Rep. 889, 111 Ind. 378; *Williams v. State*, 47 Ind. 568; *Jones v. State*, 64 Ind. 478; *Walton v. State*, 88 Ind. 9; *Archer v. State*, 4 West. Rep. 726, 106 Ind. 426; *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286.

⁶*People v. Kief*, 126 N. Y. 661; *State v. Brady*, 107 N. C. 823; *Barkley v. Copeland*, 86 Cal. 492, modifying 86 Cal. 483; *Shelby v. Com.* (Ky.) 16 S. W. 461; *Rolling v. Pueblo County Comrs.* 15 Colo. 108; *Poe v. Stockton*, 39 Mo. App. 550; *Brackett v. Griswold*, 69 Hun, 617. But statements made before the commission of the crime, by one jointly indicted but not on trial, are not admissible until after proof of conspiracy. *Belcher v. State*, 125 Ind. 419.

company, to compel it, against its will, to abstain from doing an act (to keep in its employ workmen of its own choice) which it had a legal right to do, and to do an act (employ the defendants and such persons as they should name) which it had a legal right to abstain from doing, charges acts clearly prohibited. The fact that the threat is designed as a means to an end, and that end in itself considered a lawful one, does not devalue the transaction of its criminality. They had not the right to say to the publishing company: "You shall do this or we will ruin your business." It is no answer to say that the conspiracy was for a lawful purpose; to better their own condition; to fix and advance their rate of wages, and further their own material interest. The charge that this conspiracy contemplated the wholesale boycotting of the patrons of the publishing company states an offense. *Prima facie* such conduct must be considered malicious and corrupt. Where there was proof that the "boycott" was inaugurated and prosecuted by a typographical union, of which the five or six persons in conversation, including the identified defendant, were members, their declarations were admissible. Evidence was properly admitted of a conversation between five or six printers, members of the union, among whom was one identified as a defendant, and others not identified. Evidence was properly admitted after there had been proof introduced tending to show that a particular defendant had been active in attempting to induce the public not to patronize the paper published by the publishing company. It was held proper, on the trial, to admit the declarations of a conspirator, not a defendant, made in the presence of one of the defendants, to a workman of the company, for the purpose of inducing him to join the conspiracy, that he believed that the company would not fight, as another publishing company had done. A circular as follows, in large letters, "A word to the wise is sufficient: Boycott the Journal and Courier," was ruled to be admissible in evidence. A notice to the "News" that it would be charged \$50 per week as its share of the expense of the "boycott" was admissible for the purpose of proving that defendants committed a similar offense, with the purpose to pursue the same general policy.¹

¹*State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 46; *Com. v. Curren*, 8 Pittsb. 143.

The acts and declarations of one conspirator, made in the absence of the others, in furtherance of the common design, are in ordinary cases only admissible after a *prima facie* case of conspiracy has been made out by competent evidence.¹

The admission in evidence of statements of alleged co-conspirators, made in the absence of the defendant, before the existence of the conspiracy has been established, is within the discretion of the trial judge. Declarations of co-conspirators, made in the absence of defendant, are admissible against him when made in furtherance of the conspiracy, but not when made in a casual conversation with neighbors, and not in furtherance of the conspiracy, although relating to the subject-matter thereof.²

Yet when several men form the intent and come together and agree to carry it into execution, this agreement is a step in the direction of accomplishing the purpose, and it is a crime.³ And if it be proved that the defendants pursued by their acts the same object, often using the same means, one performing one part, and another another part of the same object, the jury will be justified in concluding they were engaged in a conspiracy to effect the same object.⁴

The rule requiring a conspiracy to be first established cannot well be enforced where the proof of the conspiracy depends upon a vast amount of circumstantial evidence, a vast amount of isolated and independent facts; and in any case, where such acts and declarations are introduced in evidence, and the entire proof, taken together, shows that such conspiracy actually exists—it will be considered immaterial whether the conspiracy was established before or after the introduction of the acts and declarations of the several persons charged.⁵

The prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy.⁶

¹*Moore v. Shields*, 121 Ind. 367. So the threats of one conspirator made in the absence of the other. *Slade v. State*, 29 Tex. App. 381.

²*State v. McGee*, 81 Iowa, 17.

³*State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 46.

⁴*The Mussel Slough Case*, 5 Fed. Rep. 680.

⁵*State v. Winner*, 17 Kan. 298; *Spies v. People*, 10 West. Rep. 701, 122 Ill. 1.

⁶*Roscoe*, Crim. Ev. (7th ed.) p. 415.

As between conspirators, antecedent acts and declarations of each, pending and in pursuance of the common design, and tending to throw light upon its execution or upon the motive or intent of its perpetrators, are competent evidence against each and all of them.¹

When a conspiracy has been proved sayings and movements of defendant's co-conspirators before the perpetration of the crime are admissible against the defendant, although occurring in his absence.²

But when the common design has been consummated nothing said or done by one can affect the other.³

Where a conspiracy arises out of a concert of action and without any previous agreement as to its purpose or extent, the responsibility of any one of the conspirators ceases when he withdraws his aid and encouragement or countenance from the enterprise, but his mere absence from the scene of the unlawful act will not exonerate him when he lends his aid and encouragement to the acts and the purpose for which they are committed.⁴ So long as the conspiracy continues, the act or declaration of one, though in the absence of the other, is evidence against the latter.⁵ The record of the acquittal of one is admissible on trial of others charged with him with conspiracy.⁶

Where an unlawful plot to advance the price of lard is entered into, one of the parties thereto cannot be aided by the court to an accounting against another party to the contract, even if the latter is only an agent of the former, where there has been no

¹*Clark v. State*, 28 Tex. App. 189; *Thomas v. State*, 1 West. Rep. 309, 103 Ind. 432; *Walton v. State*, 88 Ind. 9; *Daniels v. McGinnis*, 97 Ind. 549; *Harding v. State*, 54 Ind. 359; *Williams v. State*, 81 Ala. 1; *Brown v. Herr*, 21 Neb. 118; *State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 46; *Tucker v. Finch*, 66 Wis. 17; *Owens v. State*, 16 Lea, 1; *Campbell v. Com.* 84 Pa. 187; *State v. McCahill*, 72 Iowa, 111; *Card v. State*, 7 West. Rep. 81, 109 Ind. 415; *Rex v. Hammond*, 3 Esp. 719; *People v. Mather*, 4 Wend. 261; *United States v. Cole*, 5 McLane, 601; *Reg. v. Most*, L. R. 7 Q. B. Div. 244.

²*Clark v. State*, 28 Tex. App. 189.

³*Owens v. State*, 16 Lea, 1; *Johnson v. State*, 48 Ga. 116; *Willey v. State*, Tex. 85 U. S. 570.

⁴*State v. McCahill*, 72 Iowa, 111.

⁵*Scott v. State*, 30 Ala. 508, 509, 510; *O'Neal v. State*, 14 Tex. App. 582.

⁶*Paul v. State*, 12 Tex. App. 346.

accounting or admission of indebtedness or promise to pay since the completion of the illegal scheme.¹

In a suit to recover damages for a loss occasioned by a conspiracy to injure plaintiff's business by driving away customers, declarations of customers as to why they withdrew their custom, made at the time of withdrawing, are admissible as part of the *res gestæ*.²

Trespass on the case may be maintained for conspiracy to defame and thereby injure one in his business, when, in pursuance of the combination, means have been employed which tended to accomplish the object of the conspirators.³

In an action against two or more in case, in the nature of a conspiracy, if the tort be actionable, whether committed by one or more, recovery may be had against but one, otherwise proof of the conspiracy is essential.⁴

But conspiracy is not the subject of a civil action until a third person has suffered a damage from something done under it. Then and not before, he may sue; and the wrong inflicted, not the combination to do it, is the real foundation of the action.⁵

In an action for damages resulting from a conspiracy to defraud the plaintiff, it is not necessary to a recovery that there should be actual evidence that the defendants conspired together, if there is proof that by their wrongful acts they have injured the plaintiff.⁶

¹*Leonard v. Poole*, 4 L. R. A. 728, 114 N. Y. 371; *Bartlett v. Smith*, 18 Fed. Rep. 268; *Cobb v. Prell*, 15 Fed. Rep. 774; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225.

²*Moore v. Bricklayers Union No. 1* (Super. Ct. Cin.) 7 Ry. & Corp. L. J. 108.

³*Wilde v. McKee*, 1 Cent. Rep. 919, 111 Pa. 335.

⁴*Rundell v. Kalbfus*, 125 Pa. 123.

⁵*Savile v. Roberts*, 1 Ld. Raym. 374, 378; *Hutchins v. Hutchins*, 7 Hill, 104, 108; *Herron v. Nichols*, 25 Cal. 555.

⁶*Booker v. Puyear*, 27 Neb. 346.

APPENDIX.

A.

My friend, Alfred B. Shepperson, the editor and publisher of "Cotton Facts," who is recognized as the most thoroughly advised man as to the production and profitable handling of cotton in all the markets of the world, has kindly responded to my request for views from the cotton brokers' standpoint, regarding "Futures" in cotton; the same force necessarily controlling "Futures" in grain and other farm products.

Although the letter is too late for an earlier insertion, it is far too valuable to be lost to my readers; and I insert it here, sure that they will appreciate the force of the learned writer's presentation of the debated question.

87 COTTON EXCHANGE,
NEW YORK, Feb. 4, 1892.

HON. CHARLES A. RAY,
40 Wall St., New York.

My Dear Sir :

At present a large business is done in buying and selling for future delivery, cotton, wheat, corn, oats, pork, bacon, lard, coffee, and the manufactured products of cotton and flour mills. These transactions are designated as "Cotton Futures," "Wheat Futures," "Coffee Futures," etc., to distinguish them from transactions for the immediate or prompt delivery of those commodities. The transactions in "futures," for their own account and for account of their customers, are made by members of regularly incorporated commercial exchanges at New York, Chicago, New Orleans, Liverpool, Havre, etc. Each exchange has rules for the regulation of the business in "futures" based upon commercial law and equity, and every transaction made is subject to these rules. Actual delivery by the seller and actual receipt by the buyer is contemplated of every contract for future delivery which is entered into. The rules of the exchanges im-

pose money penalties for the nondelivery of the merchandise contracted to be delivered, measured in such degree that a failure to deliver will cost the seller more than to purchase the commodity in the open market and fulfill his contract. Money penalties are likewise imposed for the failure to receive the article bought for future delivery, so that it will cost the delinquent buyer more to violate his contract than to keep it. The rules regulating the business in futures for cotton, grain, coffee, and other commodities are all based upon the same general principles and contemplate the actual fulfillment of every contract.

Trading in cotton futures was established in New York in 1870 and in New Orleans a few years later. As I am more familiar with the cotton trade than with the other trades in which transactions in futures are made I will confine my remarks more especially to cotton futures. Contracts in cotton futures are made for the delivery in lots of 100 bales during the month contracted for, such delivery to be at the seller's option upon 5 days notice to the buyer. An order on a warehouse for the cotton is tendered for every notice of delivery, by the seller to the party to whom he has sold. If the buyer has also sold the cotton for delivery during the month for which he has received notice, it is customary for him to transfer the notice of delivery and warehouse order to the party to whom he has sold, and such transfers are made until 3 P. M., of the day of issuing the notice or until its receipt before that hour by a party who has bought but has not sold, or who desires to receive the cotton, and this party receives the cotton from the one who issued the notice and warehouse order and pays for it. As those who have bought and sold have no interest beyond the difference in the price at which they bought and the price at which they sold, it would be a useless expense to have the cost of delivery and receipt incurred for each change of ownership, when the passing of the warehouse order accomplishes every purpose and saves unnecessary charges. All intermediate parties between the party who issues the notice and warehouse order and the party who receives the cotton settle with each other the difference between the price of their respective contracts and the price at which the cotton is received and paid for. In the course of business it happens that many contracts are settled

before the month of their maturity and without actual delivery of cotton. For instance, a merchant may sell for a planter a contract for October delivery, and the next day he may buy for a Southern cotton buyer a contract for delivery the same month, and if these transactions are made with the same party on the exchange, a direct settlement would be made as between the two members of the exchange.

A merchant might sell to a party, who might sell to another, and this other might have previously sold to the first party—all the transactions being for the same month's delivery. This would make a settlement of contracts between the three and is called a "ring settlement." These "ring settlements" are purely matters of chance. They may be affected very soon after the transaction, or they may not occur for months, and they may not occur at all. They do not in the slightest degree enter into the matter of the original transaction which is based upon the probability and intention of actual delivery of the cotton contracted for. In much of the legitimate business at present the transactions in futures are of great benefit to producers, manufacturers, merchants, bankers, and the general public.

About three fourths of the cotton crop is usually marketed during the first four months of the season. If such a large proportion of the crop was forced upon the market for immediate sale, the effect would certainly be to unduly and greatly depress prices. By the sale of futures against consignments of actual cotton relief is often given to an overstocked market and better prices are secured for the planter than would otherwise be possible. If prices are satisfactory, the planter can direct his merchant to sell futures against his crop before it is actually ready to be marketed and thus secure the benefit of a remunerative price which might not be obtained if the sale could not be made until his crop had actually reached a market.

Manufacturers of cotton goods, knowing the quantity of cotton required by their mills for the season can buy futures against their requirements, and being thus enabled to fix the cost of their raw material can safely make contracts for the product of their mills for months ahead. But for the ability to buy futures, the mills would be compelled to purchase large supplies of cotton at

the beginning of each season (losing interest and the expense of carrying the cotton) or forego making sales of their product beyond their purchases of actual cotton. Under the present system it is customary for the mills to sell their product for delivery many months ahead, thus ensuring constant work and with no risk of loss by fluctuations in the cost of cotton. This method of conducting business enables a mill of small capital to compete successfully with concerns of greater means, for neither are compelled to carry large stocks of actual cotton. The mills can sell their goods at a smaller margin and yet do a safe and remunerative business if they can make certain and easy provision for the cost of their supply of cotton for the season. Cotton factors and country merchants are protected in their advances on the growing crops or on consignments of actual cotton if enabled to take advantage of favorable prices and sell futures for account of their customers, against the cotton. Fertilizers are extensively sold payable in cotton to be delivered in the fall at a fixed price—so many pounds of middling cotton for each ton of fertilizers. The sale of cotton futures by fertilizer dealers against the cotton to be received by them enables them to fix, months beforehand, the money price which they are to get per ton for their fertilizers. Bankers can more safely, and will therefore more readily make loans upon cotton, if in the event of default by the borrower, they can protect themselves immediately by sales of cotton futures against the cotton held as collateral. Exchange finds readier sale when the bankers who buy it have every assurance that the cotton against which it is drawn has long since been sold for future delivery and will not incur the risk of being sold upon a declining market after its arrival in Europe. Every method which removes or lessens the element of uncertainty and risk in any industry enables the price to be reduced without diminishing the profits and thus inures to the benefit of the general public.

The tendency of business in every staple is to reduce the charges between the producer and consumer (and by "consumer" I mean cotton mills, flour mills, pork packers, etc.) to a minimum and to dispense as much as possible with "middlemen." In former years spinners bought their cotton through commission merchants

to whom they paid a commission on the purchases made for them and also all expenses of receiving and shipping the cotton. This custom has been generally abandoned and the spinners now buy of dealers at a price which includes the first cost of the cotton, the receiving and shipping charges and the dealer's profit. The dealer is given from 10 to 60 days (according to agreement) in which to ship the cotton. Usually the dealer does not own the cotton when he makes the sale, but immediately upon closing the transaction protects himself by buying cotton futures in New York or New Orleans against the operation. As he purchases the actual cotton of a quality to suit the requirements of his sale, he resells his futures to a like extent and thus insures himself against loss. By reason of his ability to "hedge," as it were, against his sales to spinners he is enabled to do business at a smaller margin and with far less risk than if he had to take the chance of an advance in price before he had succeeded in buying the cotton to deliver upon his sale. This enables the buyer to pay a higher price for the cotton just to the extent of the smaller profit he is willing to take because of his lessened risk. If compelled to exact a larger profit for his risk he must pay a less price to the planter, for the price of cotton is regulated by what the spinners are willing to pay and not by what the planter wishes to get.

It is undeniably true that there is much of pure speculation in futures for cotton, grain, etc. This cannot be prevented, but should not cause people to overlook the benefits conferred upon legitimate business by this system of trading. Every kind of business is in some degree speculative. No article of merchandise remains constantly at the same fixed value. The most conservative of retail dealers takes the risk of his stock of goods declining in market value before he can dispose of it. This risk is a speculation, but it is called good foresight or bad foresight according to its result. The retail dealer tries to read the future of prices and trade and buys heavily or sparingly according to his view of the future. It is simply a speculation upon his correctness in forecasting the future. A builder will contract to erect a block of houses before he owns the necessary lumber, bricks, stone and hardware. A railroad contractor will contract to build a railway before buying a cross-tie or a length of steel rail. Does anyone

class the builders and the railway contractors as mere speculators, and yet the element of speculation enters largely into all their transactions. The planter who sells only sufficient of his crop to pay advances and meet present wants, and holds back the remainder in the hope of getting a higher price for it, is quite as much of a speculator as the merchant who buys the planter's cotton and holds it for an advance. In this country of boundless possibilities a majority of men take hopeful views of things. In all speculative affairs vastly more people operate for an advance than for lower prices. More speculators are interested always in putting up prices than in depressing values. Farmers who raise grain and cotton should not object to these allies, the "bulls" of speculation, for their elation often advances prices beyond their proper level.

The "bears" of speculation, who sell what they do not own and then try to depress values so as to buy it back at a price lower than at which they sold, are often the means of advancing prices. Nothing exceeds the eagerness to buy of the "bear" who has sold what he did not possess and finds the market advancing. In his haste to buy he does not stop at trifles, and often forces prices far above a proper rate. His efforts are often a source of real strength to an otherwise weak market. Merchants all understand this, and after a while I trust farmers will also realize it and cease their attacks upon the business of trading in futures. It will readily be admitted that the more buyers there are for any commodity the better the chances are for good prices. This is but another way of stating the proposition that prices are regulated by supply and demand, and that the greater the demand the higher the price. Every "bear" operator who sells what he does not own will sooner or later, but inevitably, have to buy it. The more he sells the more he will have to buy, and he cannot dictate the price he will have to pay, for the seller will have a large share in regulating that matter. It not infrequently happens that "bears" are about the only people who do want to buy, and at such times prices would inevitably decline, and perhaps seriously, but for their opportune buying.

In closing this communication it is proper that I should refer to a comparatively new but very large business which is now done

in actual grain and cotton through the instrumentality of dealing in future deliveries and as an outgrowth of that system. This is the buying of actual grain and cotton by merchants who store the produce and sell contracts for future delivery against their purchases. The price for futures is usually enough higher than the price of the article for immediate delivery to cover storage, insurance, loss in weight and a fair interest to the time of delivery.

This is a perfectly legitimate business, and while, as a rule, it pays only moderate profits, there is very little risk involved. It affords a safe and fairly remunerative employment of capital which otherwise would seek investment in other channels. This business is of great benefit to farmers, because it provides a demand for the surplus production of grain and cotton beyond the immediate wants of the flour and cotton mills, which demand takes the weight of this surplus from the market and carries it until needed for actual consumption. If this class of buyers was taken from the market by the discontinuance of the system of trading in 'futures,' all articles of produce for which transactions for future deliveries are now made would have to find a market at the price at which manufacturers would be willing to buy and keep the produce until needed for consumption. There would be no competition with the mill owners, and it is but reasonable to suppose that they would form combinations to regulate prices, and that very much lower figures would rule than if competitive buyers were in the market. At present there is a stock of cotton in New York of 388,000 bales and in New Orleans of 449,000 bales, the combined stock in the two markets being nearly twice as much as at the corresponding time last year. Sales of futures have been made against a very large proportion of this immense stock, thus relieving the markets of a pressure which would inevitably have carried prices far below the present rates which are lower than for 43 years. Mr. A. J. Sawyer, a prominent merchant and capitalist of Minneapolis, owns 175 grain elevators located upon the lines of the Northern Pacific and the Manitoba railroads, and buys wheat directly of the farmers, selling futures against his purchases. By his methods of business the farmers in the vicinity of his elevators are given a near and constant market for their wheat and at fair prices. I am told his payments for wheat often amount to

\$150,000 a day. His immense business which is of such great advantage to the farmers could not be carried on without the existing facilities for selling wheat futures in Chicago and New York. Indeed Mr. Sawyer has recently made a statement to this effect to a committee of Congress.

Nearly everything which I have written concerning cotton will apply equally to grain and provisions.

Yours very truly,

ALFRED B. SHEPPERSON.

B.

The bills to prevent dealing in "options" and "futures," now pending in Congress, and one of which, in the improbable event of there being any legislation, will likely pass, are the one introduced in the Senate, December 14th, 1891, by Senator Washburn, and the other introduced in the House of Representatives, January 11th, 1892, by Congressman Hatch.

It does not follow that because either of these measures are advocated by two or three of the largest manufacturers of flour, that this is done in the general interest of the producers of that article. It is possible if either of these bills pass, that when wheat comes upon the market after harvest in immense quantities and is thereby depressed in price,—there being then no market for "futures"—these wealthy manufacturers may purchase their year's supply, storing it for use; and the smaller manufacturer, not being able to make this investment, and not being permitted to contract for the future delivery to them of the wheat, will be driven out of the business; and it may chance, that the means thus taken to prevent dealing in "futures," will result in reducing the competition among the purchasers of wheat, contracting the time within which it must be sold, forcing it on the market, and thereby depressing its price, and at the same time creating a monopoly in flour, which will increase its price, placing the difference in the pockets of the manufacturer, and degrading the quality. Crude legislation to control the course of trade, does not always result advantageously.

The proposed legislation is as follows:

A Bill Defining "Options" and "Futures" and Imposing Special Taxes on Dealers Therein, and for Other Purposes.

Be it Enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That for the purpose of this Act the word "options" shall be understood to mean any contract or agreement whereby a party thereto, or any party for whom or in whose behalf such contract or agreement is made, contracts to have or give to himself or another the option to buy or sell at a future time any of the grain or other commodity mentioned in section three of this Act.

SEC. 2. That for the purposes of this Act the word "futures"

shall be understood to mean any contract or agreement whereby a party agrees to buy, or agrees to sell and deliver, at a future time to another any of the articles mentioned in section three of this Act, when at the time of making such contract or agreement the party so agreeing to make such delivery, or the party for whom he acts as agent, broker, or employé in making such contract or agreement, is not at the time of making the same the owner of the article so contracted and agreed to be delivered, (or unless the articles so contracted to be sold and delivered shall subsequently be actually delivered to the purchaser for manufacture or consumption:) *Provided, however,* That this Act shall not apply to any contracts or agreements for the future delivery of any of the said articles made with the United States, or any State, county, or municipality, or with the duly authorized officers or agents thereof, nor to the contracts or agreements made by farmers for the sale and delivery of any of the articles aforesaid which are in actual course of production by such farmers at the time of making such contract or agreement.

SEC. 3. That the articles to which the foregoing sections relate are wheat, corn, oats, rye, barley, cotton, and all other farm products; also pork, lard, and all other hog products.

SEC. 4. That special taxes are imposed as follows: Dealers in "options" or "futures" shall pay annually the sum of one thousand dollars, and shall also pay the further sum of five cents per pound for each and every pound of cotton or pork, lard, or other hog products, and the sum of twenty cents per bushel for each and every bushel of any of the other articles mentioned in section three of this Act, the right and privilege of delivering which may be acquired under any "options" contract or agreement as defined by section one of this Act, or which may be sold to be delivered at a future time or period under any "futures" contract or agreement as defined in section two of this Act, which said amounts shall be paid to the collector of internal revenue, as hereinafter provided, and by him accounted for, as required in respect to other special taxes collected by him. Every person, association, copartnership or corporation who shall, in their own behalf, or as broker, agent, or employé of another, deal in "options" or make any "options" con-

tract or agreement as hereinbefore defined shall be deemed a dealer in "options," and every person, association, copartnership, or corporation who shall, in their own behalf, or as broker, agent, or employé of another, deal in "futures" or make any "futures" contract or agreement as hereinbefore defined shall be deemed a dealer in "futures."

SEC. 5. That every person, association, copartnership, or corporation engaged in, or proposing to engage in, the business of dealer in "options" or of dealer in "futures" as hereinbefore defined shall, before commencing such business or making any such "options" or "futures" contract or agreement, make application in writing to the collector of internal revenue for the district in which he proposes to engage in such business or make such contract or agreement, setting forth the name of the person, association, partnership, or corporation, or place of residence of the applicant, the business engaged in, and where such business is to be carried on, and in case of partnership, association, or corporation, the names and places of residence of the several persons constituting the same, and shall thereupon pay to such collector the sum aforesaid of one thousand dollars, and shall also execute and deliver to such collector a bond in the penal sum of five thousand dollars, with two or more sureties satisfactory to the collector, conditioned upon the full and faithful compliance by the obligor therein with all the requirements of this Act. And thereupon the collector shall issue to such applicant a certificate, in such form as the commissioner of internal revenue shall prescribe, that such applicant is authorized for the period of one year from the date of such certificate to be a dealer in "options" or "futures," and to make "options" or "futures" contracts or agreements as hereinbefore defined, and for the period specified in such certificate the party to whom it is issued may conduct the business of dealer as aforesaid. Such certificate may be renewed annually upon compliance with the provisions of this Act, and any "options" or "futures" contract or agreement as defined by this Act shall be absolutely void as between the parties thereto and their respective assigns unless the party making such contract or agreement shall have at the time of making the same a certificate as aforesaid authorizing the making thereof.

SEC. 6. That it shall be the duty of the collector to keep in his office a register containing a copy of each and every application made to him under the foregoing section, and a statement in connection therewith as to whether a certificate had been issued thereon, and for what period, which book or register shall be a public record and be subject to inspection of any and all persons desiring to examine the same.

SEC. 7. That every "options" or "futures" contract or agreement, as hereinbefore defined, shall be in writing and signed in duplicate by the parties making the same; and any such contract or agreement not so made and signed shall, as between the parties thereto and their assigns, be absolutely void.

SEC. 8. That it shall be the duty of every person, copartnership, association, or corporation, on the first day of the week next succeeding the date of the certificate issued to them, and on the first day of each and every week thereafter, to make to the collector of the district in which any "options" or "futures" contract or agreement has been made full and complete return and report, under oath, of any and all such contracts or agreements made or entered into by such person, copartnership, association, or corporation during the previous week, together with a statement of the article or articles embraced in or covered by such contracts or agreements and the amounts, respectively, of each, and the name of the party or parties with whom such contracts or agreements have been made, and at the same time to pay to such collector the amount of the tax hereinbefore required of five cents per pound on each and every pound of cotton, and of pork, lard, or other hog products, and of twenty cents per bushel on each and every bushel of any of the other articles mentioned in section three of this Act which are the subject of, or covered by, such contracts or agreements, or any of them, for which sums such collector shall give his receipt to the party so paying, and the sums so collected shall be accounted for by the collector as provided by law in respect to other taxes collected by him.

SEC. 9. That every person who shall, in his own behalf or in behalf of any other person, association, partnership, or corporation, enter into any "options" or "futures" contract or agreement as defined by this Act without having a certificate of

authority from the collector as hereinbefore provided, and covering the time at which such contract or agreement shall be made, shall, besides being liable for the amounts prescribed in section four of this Act, be fined not less than one thousand dollars and not more than five thousand dollars for each and every such offense. And every person who shall make to the collector a false or fraudulent return or report required by section eight of this Act shall be subject to a fine of not less than one thousand dollars nor more than five thousand dollars, or to imprisonment, for not less than thirty days nor more than six months, or to both such fine and imprisonment.

SEC. 10. That neither the payment of the taxes required nor the certificate issued by the collector under this Act shall be held to exempt any person, association, copartnership, or corporation from any penalty or punishment, now or hereafter provided by the laws of any State for making contracts or agreements such as are hereinbefore defined as "options" or "futures" contracts or agreements, or in any manner to authorize the making of such contracts or agreements within any State or locality contrary to the laws of such State or locality; nor shall the payment of the taxes imposed by this Act be held to prohibit any State or municipality from placing a tax or duty on the same trade, transaction or business for state, municipal or other purposes.

SEC. 11. That section thirty-two hundred and nine of the Revised Statutes of the United States is, so far as applicable, made to extend and apply to the taxes imposed by this Act and to the persons upon whom they are imposed.

C.

Mr. Hatch introduced the following bill :

A Bill Defining "Options" and "Futures" and Imposing Special Taxes on Dealers Therein, and for Other Purposes.

Be it Enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of this Act the word "options" shall be understood to mean any contract or agreement whereby a party thereto, or any party for whom or in whose behalf such contract or agreement is made, acquires the right or privilege, but is not thereby obligated, to deliver to another, at a future time or within a designated period, any of the articles mentioned in section three of this Act.

SEC. 2. That for the purposes of this Act, the word "futures" shall be understood to mean any contract or agreement whereby a party contracts or agrees to sell and deliver to another at a future time, or within a designated period, any of the articles mentioned in section three of this Act, when at the time of making such contract or agreement the party so contracting or agreeing to sell and make such delivery, or the party for whom he acts as agent, broker or employé in making such contract or agreement, is not the owner of the article or articles so contracted or agreed to be sold and delivered: *Provided, however,* That this Act shall not apply to any contract or agreement for the future delivery of any of said articles, made for and in behalf of the United States, or of any State, Territory, county or municipality, with the duly authorized officers or agents thereof, nor to any contract or agreement made by any farmer for the sale and delivery at a future time, or within a designated period, of any of said articles which are in actual course of production at the time of making such contract or agreement, on land then owned or occupied by such farmer.

SEC. 3. That the articles to which the foregoing sections relate are raw or unmanufactured cotton, wheat, corn, oats, barley, rye, pork, lard, bacon, and other edible products of swine.

SEC. 4. That special taxes are imposed as follows: Every dealer in "options" or "futures," as defined in this Act, shall pay annually the sum of two thousand dollars, and shall also pay the

further sum of five cents per pound for each and every pound of raw or manufactured cotton, pork, lard, bacon, or other edible product of swine, and the sum of twenty cents per bushel for each and every bushel of any of the other articles mentioned in section three of this Act, the right or privilege of delivering which to another at a future time, or within a designated period, may be acquired by such dealer in his own behalf, or in behalf of others, under any "options" contract or agreement, as defined by section one of this Act, or which may be contracted, or agreed to be sold, by such dealer in his own behalf, or in behalf of others, to be delivered to another at a future time, or within a designated period, under any "futures" contract, or agreement, as defined in section two of this Act, which said amount or amounts shall be paid to the collector of internal revenue, as hereinafter provided, and by him accounted for, as required in respect of other special taxes collected by him. Every person, association, copartnership, or corporation who shall in their behalf, or as agent, broker, or employé of another deal in "options" or make any "options" contract or agreement, as hereinbefore defined, shall be deemed a dealer in "options," and every person, association, copartnership, or corporation who shall in their own behalf, or as agent, broker, or employé of another, deal in "futures" or make any "futures" contract or agreement, as hereinbefore defined, shall be deemed a dealer in "futures."

SEC. 5. That every person, association, copartnership, or corporation engaged in, or proposing to engage in, the business of dealer in "options," or of dealer in "futures," as hereinbefore defined, shall, before commencing such business or making any such "options" or "futures" contract or agreement, make application in writing to the collector of internal revenue for the district in which he or any of them proposes to engage in such business or make such contract or agreement, setting forth the name of such person, association, copartnership, or corporation, place of residence of the applicant, the business to be engaged in, where such business is to be carried on, and in case of an association, copartnership, or corporation, the names and places of residence of the several persons constituting such association, copartnership, or corporation, and shall thereupon pay to such collector the sum

aforesaid of two thousand dollars, and shall also execute and deliver to such collector a bond in the penal sum of forty thousand dollars, with two or more sureties satisfactory to said collector, conditioned that the obligor therein shall pay, or cause to be paid, the tax or taxes as herein provided, and upon the full and faithful compliance by such obligor with all the requirements of this Act. And thereupon the collector shall issue to such applicants a certificate, in such form as the commissioner of internal revenue shall prescribe, that such applicant is authorized, for the period of one year from the date of such certificate, and within such district, to be a dealer in "options" and "futures," and to make, within such district, "options" and "futures" contracts or agreements, as hereinbefore defined, and for the period specified in such certificate the party to whom it is issued may conduct the business of dealer as aforesaid. Such certificate may be renewed annually upon compliance with the provisions of this Act, and any "options" or "futures" contract or agreement, as defined by this Act, shall be absolutely void, as between the parties thereto and their respective assigns, unless the party acquiring, for himself or another, the right or privilege of delivering, or contracting and agreeing, for himself or another, to sell and deliver the article or articles named in such contract or agreement shall have, at the time of the making thereof a certificate, as aforesaid, authorizing the making of "options" and "futures" contracts and agreements as hereinbefore defined: *Provided, however,* That so long as any tax provided in this Act shall remain due and unpaid the person, association, copartnership or corporation from whom such tax shall be due shall not, during the time such tax remains due and unpaid, conduct or transact the business of a dealer in "options" or conduct or transact the business of a dealer in "futures," and any "options" or "futures" contract or agreement made or entered into by any person, association, copartnership, or corporation from whom any sum as a tax, as provided in this Act, shall remain due and unpaid shall, as between the parties thereto and their respective assigns, be absolutely void, and every person, association, copartnership, or corporation making any such "options" or "futures" contract or agreement while any tax herein provided shall remain due from such party, shall be subject to the fines and penalties hereinafter provided.

SEC. 6. That it shall be the duty of the collector of internal revenue to keep in his office a book in which shall be registered a copy of each and every application made to him under the foregoing section, and a statement in connection therewith as to whether a certificate has been issued thereon, and for what period, which book or register shall be a public record and be subject to the inspection of any and all persons.

SEC. 7. That every "options" or "futures" contract or agreement, as hereinbefore defined, shall be in writing and signed in duplicate by the parties thereto, and every such "options" contract shall state, in explicit terms, the time when the right or privilege of delivering the article or articles therein named shall expire, and every such "futures" contract shall state, in explicit terms, the day upon which, or the last day of the period within which, the article or articles therein contracted or agreed to be sold shall be delivered, and any such contract or agreement not including such statement and not so made and signed shall, as between the parties thereto and their respective assigns, be absolutely void.

SEC. 8. That it shall be the duty of every person, association, copartnership, or corporation conducting or transacting the business of a dealer in "options" or "futures," as defined by this Act, to keep a book in which shall be recorded, on the day of its execution, the date of each and every "options" or "futures" contract or agreement made or entered into in behalf of such person, association, copartnership, or corporation, or in behalf of another, and setting forth the name and place of business of the person, association, copartnership, or corporation in whose behalf, as vendor, such contract or agreement shall have been made, the name and place of business of the party or parties, as vendee, with whom such contract or agreement shall have been made, the kind and amount of the article or articles embraced in or covered by each such contract, the time when the right or privilege of delivering such article or articles as are embraced in any "options" contract shall expire, and the time when, or the designated period within which, delivery shall be made of the article or articles embraced in or covered by any "futures" contract, and such book shall, at all times, be subject to inspection by the collector, deputy col-

lector, and inspector of internal revenue, or any duly authorized agent of the Internal Revenue Department, who may take memoranda or transcripts therefrom.

SEC. 9. That it shall be the duty of every person, association, copartnership or corporation, on the Monday of the week next succeeding the date of the certificate issued to them, and on the Monday of each and every week thereafter, to make to the collector of internal revenue for the district in which any "options" or "futures" contract or agreement shall have been made by such person, association, copartnership, or corporation, full and complete return and report, under oath and in such form as the Commissioner of Internal Revenue shall prescribe of any and all such contracts or agreements made or entered into by such person, association, copartnership, or corporation during the preceding week, whereby such person, association, copartnership, or corporation acquires, in their own behalf or in behalf of others, the right or privilege of delivering to another, at a future time, or within a designated period, or contracts and agrees, in their own behalf or in behalf of others, to sell and deliver to another, at a future time, or within a designated period, any of the articles mentioned in section three of this Act, together with a statement of the article or articles embraced in or covered by each such contract or agreement and the amounts, respectively, of each such article, and the name or names of the party or parties with whom each such contract or agreement shall have been made; and at the same time the party whose duty it shall be to make such return or report shall pay to such collector the amount of tax provided, and then due and payable of five cents per pound on each and every pound of cotton and of pork, lard, bacon, or edible product of swine; and of twenty cents per bushel on each and every bushel of any of the other articles mentioned in section three of this Act which are the subject of, embraced in, or covered by, such contracts or agreements, or any of them, for which sums such collector shall give his receipt to the party so paying, and such collector shall, upon the making of such return or report enter in a book, to be kept for that purpose, the date of each such "options" or "futures" contract or agreement included in such return or report, the name, residence and place of business of each

party thereto, and whether they appear as vendor or vendee, the kind and amount of each article, the right or privilege of delivering which, to another, is thereby acquired, and the kind and amount of each article thereby contracted to be sold, and delivered to another, the date upon which each such "options" or "futures" contract or agreement shall, by its express terms, expire or mature, and the amount of tax upon the article or articles the right or privilege of delivering which is acquired, or that shall have been contracted or agreed to be sold and delivered as aforesaid, which book or register shall be a public record subject to the inspection of any and all persons. That the person, association, copartnership, or corporation making or entering into any "options" or "futures" contract or agreement, as defined in this Act, in their own behalf or in behalf of others, shall, upon filing with the collector of internal revenue the return or report aforesaid, in addition to the taxes hereinbefore provided, pay to such collector the sum of two dollars, as a registry fee, for each and every such "options" or "futures" contract or agreement included in such return or report.

SEC. 10. That every person who shall, in his own behalf, or in behalf of any other person, association, copartnership, or corporation, make or enter into, as vendor, any "options" or "futures" contract or agreement, as defined by this Act, without having a certificate of authority from the collector of internal revenue, as hereinbefore provided, and covering the time at which such contract or agreement shall be made, or who shall fail or refuse to keep any book or make any return or report required by this Act, or in lieu of the return or report required by this Act shall make a false, fraudulent or partial return or report, or shall make or enter into any "options" or "futures" contract or agreement in form other than as prescribed in section seven of this Act, or fail or refuse to pay, when due, any tax herein provided, or shall in any other respect violate any of the provisions of this Act shall, besides being liable for the amount of tax or taxes prescribed in this Act, for each and every such offense, pay a fine of not less than one thousand dollars nor more than twenty thousand dollars, or be imprisoned not less than six months nor more than ten years, or be subject to both such fine and imprisonment.

SEC. 11. That neither the payment of the taxes hereinbefore provided, nor the certificate issued by the collector of internal revenue under this Act, shall be held to exempt any person, association, copartnership, or corporation from any penalty or punishment, now or hereafter provided by the laws of any State or Territory for making contracts or agreements such as are hereinbefore defined as "options" or "futures" contracts or agreements, or in any manner to authorize the making of such contracts or agreements within any State, Territory, or locality contrary to the laws of such State, Territory, or locality; nor shall the payment of the taxes imposed by this Act be held to prohibit any State, Territory, or municipality from placing a tax or duty upon the same trade, transaction, or business for state, territorial, municipal, or other purposes.

SEC. 12. That all provisions of the law now in force relating to the recovery and enforcement of taxes, fines, and penalties imposed under the laws concerning internal revenue, and not inconsistent with the provisions of this Act, are hereby made to extend and apply to the recovery and enforcement of the taxes, fines, and penalties imposed by this Act.

SEC. 13. That the commissioner of internal revenue shall prescribe such rules and regulations as may be necessary to carry into effect the provisions of this Act, and when such rules and regulations shall have been approved by the Secretary of the Treasury, they shall have the force and effect of law.

D.

Protest of the New York Produce Exchange against the passage of Senate Bill No. 1757, introduced by the Hon. Mr. Washburn, and entitled "A Bill Defining 'Options' and 'Futures,' and Imposing Special Taxes on Dealers Therein, and for Other Purposes."

To the Honorable the Senate of the United States:

GENTLEMEN:—The New York Produce Exchange received its charter from the Legislature of the State of New York in 1862. Some of the purposes of the corporation are therein set forth as being "To inculcate just and equitable principles in trade, to establish and maintain uniformity in commercial usage, to acquire, preserve and disseminate valuable business information and to adjust controversies and misunderstandings between persons engaged in business."

We have fulfilled our charter obligations in a manner that has obtained for us leadership and influence abroad, and confidence and respect at home. Our membership numbers three thousand active, business merchants, among whom are representatives from our large financial institutions and managers of all the lines of inland and ocean transportation centering in New York. Our sessions are held daily during the business hours, we are in continuous telegraphic contact with the markets of the old and new world, and the information thus obtained is free to all our large constituency.

While not entirely confined to, our business is largely in, the food products of the United States (both in their original and manufactured states), and its ramifications extend to the producer on the farm and the consumer in both the home and foreign markets. In fact it is almost impossible to fix a limit to the influence we exert, or say where it is not potently felt.

Having thus introduced ourselves, we now, in the name of the New York Produce Exchange, respectfully but earnestly protest against the enactment of the Washburn Bill, for the following reasons:

1.—That it seeks to legalize a most pernicious and vicious system of gambling that is demoralizing and degrading, and to the operation of which our Exchange has always been opposed.

2.—That it aims to overturn existing conditions that are the outcome of careful thought, and sound mercantile judgment brought to bear upon old methods that became inoperative, under the strain of increasing production, the rapid development of railroad transportation, the more general and prompt transmission of business information, and the intense energy of commercial enterprise.

3.—That it seeks to destroy existing benefits that legitimate sales for future delivery now confer upon the agriculturist at his own door, and through which he realized what may be termed "the highest world price," at the time he desires to sell, less the cost of transportation and a minimum charge by the middlemen who stand ready at all times to purchase his products.

4.—That it would drive to the wall a large army of middlemen, as a rule modest merchants of moderate means, but active, earnest, honorable, who are to be found in the smaller towns and villages located on the lines of our great railroads, and who have done so much to build up their respective neighborhoods, and bring the commerce of the United States to the magnificent proportions that it presents to-day.

5.—That it is veneered with moral and philanthropic pretense to hide a selfish purpose, which aims to injure the many for the direct benefit of the few.

FIRST OBJECTION.—The Bill in question, it is proper to state, makes a distinction in the meaning of terms which have heretofore, on our Exchange, been considered synonymous. Sales for future delivery have always been dealt in and deemed the established right of buyer and seller whenever the occasion required such transactions, but they did not become a recognized necessity for the purposes of protection against loss and for facility of operation until about the year 1875. Then, because of the rapidly increasing volume of business in farm products, they became more general, and for brevity were sometimes called "options," simply for the reason that when the period of delivery was arranged to suit the convenience of the purchaser, it was called a "buyer's option," and *vice versa*, a "seller's option;" in either case it was a transaction similar in all respects to the meaning given to the term "futures" in the second section of the Bill.

The meaning given to the term "option" in the first section is known to us as a species of gambling called "puts and calls," or "privileges," which are transactions opposed to law and good morals, and should not be permitted under any circumstances. Noticing a growing tendency in some places to tolerate such trading, this Exchange adopted a rule in 1887 which disciplines any member, by public censure, suspension, or expulsion, as the Board of Managers should determine, who may be proved guilty of making such trades on the floor of our Exchange.

If section one of this Bill suppressed altogether such vicious trading, we would heartily endorse it, but it is because the proposition is to legalize it, and place it on a parity with sales for future delivery, that we earnestly protest against it.

SECOND OBJECTION.—"That it aims to overturn existing conditions," etc. If there is any one element more noteworthy than another in advancing what may be termed the "agricultural" or "farm commerce" of the United States into the proportions it presents to-day it is the facility with which transactions can be made with all markets (foreign and domestic) for our surplus farm products, through the medium of purchases and sales for future delivery. It is impossible to give you the volume or value of home transactions as they are being operated daily in hundreds, I might even say thousands, of major and minor markets throughout the length and breadth of the land. Such statistics cannot be obtained, but from our statistician I have received the declared value of the three great articles of commerce that are attacked in this bill, viz, breadstuffs, provisions, cotton, which were shipped to foreign countries during the year 1891. They are as follows:

Breadstuffs	\$231,275,709
Provisions.....	130,321,693
Cotton	277,038,511
Total	\$638,635,913

The total value of *all* articles exported from the United States (specie excepted) during the same period was \$957,339,705, so that you are faced with the grave responsibility of dealing with a measure that directly affects not only our enormous home trade,

but also almost eighty-one per cent (exact $80\frac{1}{10}\%$) of our total foreign exports (specie excepted), and all parties who are directly or indirectly interested therein.

Now, we do not hesitate to say (although we speak more from an experience in breadstuffs and provisions, but our cotton friends are present and will please correct us if we are in error) that by far the larger part of these enormous shipments were purchased by the exporter for future delivery, and that before they reached the port of ultimate shipment they formed the basis of transactions for future delivery outside of the exporter, aggregating a very much larger amount, every one of which was legitimate and mercantile. But this is not all, the vessel service which was required to transport all this merchandise to its place of final destination was contracted for, to a very great extent, long before the vessels sailed for their American ports, and the bills of exchange which provided the "ways and means" for payment were also largely sold to the dealers in foreign exchange, for future delivery. In fact, almost every element in these shipments partook of the "future" character, the object being to minimize the risk arising from a possible change in market values between the date of the original purchase from the producer and arrival at the place of consumption.

We will make a further statement relative to these shipments and challenge its contradiction. If the "future" element had been eliminated from such transactions, the volume of our exports would have been much decreased, and the farmer would have received a much less price for the product that he would have been able to market, for the reason that under the old regime the middlemen, who were generally firms of large wealth, required a very much larger percentage of margin against possible loss than is required under the present system.

Now, what is urged in opposition to future sales? It is said that the system is used as a cloak for transactions which sometimes savor more of gambling than of legitimate operations, and the assertion is made, that as a large part of the merchandise sold for future delivery on our prominent exchanges is never actually delivered to the original purchaser, this fact is *prima facie* evidence of their illegitimate character. Before answering this

statement (and it is held to be true, we doubt not, by many who have only superficially examined the subject), permit me to present the form of contract that is required in these future transactions. It reads as follows:

GRAIN CONTRACT.

NEW YORK, February, 1892.

In consideration of one dollar in hand paid, the receipt of which is hereby acknowledged, I have this day *sold to* (or *bought from*) Richard Roe, 5,000 bushels of No. 2 wheat, New York inspection, at 100 cents per bushel of 60 lbs., deliverable at seller's (or buyer's) option in May, 1892.

This contract is made in view of, and in all respects subject to the by-laws and rules established by the New York Produce Exchange, in force at this date.

JOHN DOE.

It is concise and definite and in every respect legal and binding. If either one of the contracting parties desires actual delivery under it, it must be made and there is no power extant that can relieve the other from this obligation, or the damage that may arise from such non-delivery. It is true, however, that at times a large, and during seasons of great activity such as we have just been having, a very large proportion of these future transactions are not consummated by actual delivery, but this is done by mutual consent of both parties, and for which an equitable mercantile equivalent is substituted, simply as a convenience to facilitate settlements, which under the old system of actual delivery under all circumstances, was found to be cumbersome and attended with the loss of valuable time and risk. Take New York, for example. It is a great objective point for mercantile transactions made on behalf of parties throughout the old and new world. With such a constituency it continually happens, that the merchant who sells to-day is a purchaser of the same article to-morrow. and in the aggregate of these transactions, it also often happens, that a transaction in which he was the buyer, can be matched with a subsequent one in which he was the seller of the same description of merchandise and for like delivery in all respects except as to price, and when this matching does take place differences in value only are paid and the contract closed without going through the forms of delivery and re-delivery with all their at-

tendant inconveniences. In such cases, and they are the only ones where actual delivery does not take place, there would be absolutely nothing gained by a strict adherence to the old rule, and therefore it was willingly abandoned.

Perhaps this can be made more evident by citing the bank clearing-house system in vogue in all our large cities. By means of this system, enormous daily monetary transactions are settled in a very few minutes, by the actual interchange of comparatively small sums of money. Bank A receives on deposit during the day cheques on Bank B to the aggregate of \$200,000 and Bank B cheques on Bank A to the aggregate of \$190,000. The following day these banks send their respective claims to the clearing house, and that of B is matched against that of A, as far as it will go, and the balance paid in cash. In this hypothetical case a joint indebtedness of \$390,000 was settled by the payment of only \$10,000 of actual money, and yet every item in the major amount was legitimate, nor did the system of settlement employed suggest that a single factitious element had entered into the transaction from its inception to its close. It was the growing business of the banks that suggested the invention of the clearing-house, just as it was the urgent needs of commerce to improve upon the old method of actual delivery in every instance and under all circumstances, that suggested the application of the clearing system, when practicable, as a more rapid and convenient means of settling contract obligations. In like manner the railroad, the steamship, the telegraph and the telephone, have all been made the servants of commerce, and each has contributed its quota in aiding her marvelous development, and now all such means are deemed absolutely essential adjuncts, which cannot safely be dispensed with. But even if the charge, "that some illegitimate speculation is operated under the cloak of sales for future delivery," is true, what then? Is a great public good to be abrogated because of a claimed inability to entirely check a minor defect? It is as impossible, at all times, to draw the line so definitely that a mercantile offense of this character cannot be committed, as it is to make laws which will absolutely suppress all crime. But (as far as an intelligent consideration of the subject can suggest remedies which will counteract this injurious influence) you will find our boards

of trade and exchanges have not been idle, and by rules and by-laws have controlled these "commercial pirates," to a strict accountability for their acts. Here is a rule that holds both buyer and seller to a money responsibility that they cannot avoid:

"On all sales or purchases of grain for future delivery either party to the contract shall have the right to call an original margin of ten cents per bushel on wheat, rye and barley, and five cents per bushel on corn and oats, and a further margin from time to time to the extent of any variation in the market value from the contract price."

This rule is both restrictive and protective, and forcibly reminds each party entering into future transactions that he must put up his money and leave it beyond his control till he has fulfilled his obligation, as an evidence of his good intent. It also limits the "short seller" to the ability of his pocket to respond to marginal calls, and keep the margin good. Now, when it is remembered that the "short seller" is operating in the face of a world-wide market, it is evident that the moment he gets below legitimate values, he will be overwhelmed with purchasers who are always on the lookout for bargains and who will insist on the money protection under the marginal rule. It is our experience that the application of this rule is a most effective check upon the professional "short seller." Here is another rule which is equally protective, but in another direction, and is given as an evidence of the thoughtful care that surrounds all these future transactions:

"RULE 32.—SEC. 1.—In case any property, contracted for future delivery, be not delivered at maturity of contract, the purchaser shall notify, in writing, the Committee on Grain, of the failure to deliver, and the Committee on Grain shall, at the next call, publicly read such notice, and buy in the grain for account of the party directing the purchase, but no unreasonable price shall be paid, arising from manipulated or fictitious markets, or unusual detention in transportation. Any legitimate loss resulting to the buyer shall be paid by the party in default and the grain so bought shall be a good delivery on defaulted contracts maturing that day."

Under this rule the person who aims to operate a "corner" is quickly defeated, for a manipulated or fictitious price cannot be enforced.

These examples could be largely multiplied, but we infer that enough has been said to show that the possible evils of future sales have been much exaggerated, and that their correction has received, and is continuously receiving, the thoughtful attention of honorable, competent men.

THIRD AND FOURTH OBJECTION.—“That it will injure the producer by restricting the range of his market,” and “will drive to the wall the large army of middlemen” is self-evident and will be treated of, doubtless, by the representatives of the boards of trade near to the sources of production and the homes of those active traders, than we in New York, that I will not occupy your time discussing it, further than to say that the absolute success of a large part of the business enterprises operated on and through our exchange is almost wholly dependent upon the agricultural classes, and the person and firms and elevator associations with whom they directly deal. An injury to them comes rapidly home to us, and from that standpoint of intimate relationship, we give it to you as our deliberate judgment that you could not enact a more unfortunate or aggressive law against our common interests, than the bill under consideration, which we denounce as ill-advised, illogical, and in its spirit, bad.

To destroy by legislation the protective element furnished by sales for future delivery, is simply to drive a large “produce purchasing constituency” from the field, and would prove so disastrous to the agricultural classes that upon the first opportunity after they realized its injurious effect, they would relegate the legislator who advocated and enacted it into political oblivion.

FIFTH OBJECTION.—“It is veneered with moral and philanthropic pretense,” etc.

In making this assertion we have simply stated our belief with the view of putting you on your guard, and inducing critical examination into motives, before reaching a conclusion. In seeking a reason for the introduction of this objectionable measure into Congress, we soon found to our satisfaction (that while ignorance of the whole subject and a laudable desire to shield the agriculturist from the “raids” of the “short seller,” and the community at large from the efforts of the “corner” monger to give to food products an exaggerated value, had something to do with

it) the more dangerous element was cloaked under the cry "that it was morally wrong to sell what was not actually held in hand." The authors of this foolish platitude, while posing as the "farmer's friend," are nothing short of his worst enemies. Their aim is to deprive him of his "world-wide market" by driving off competition through legislative aid, and thus having corralled him into the narrow limits prescribed in this bill, purchase his products at their own time and price.

Many expedients have heretofore been resorted to, to induce the holding back of farm products from the ordinary channels of commerce (particularly in the Northwest) and failed, and now as a last effort the Congress of the United States is unblushingly asked, under the plea of needed revenue legislation, to tax out of existence a mercantile right that is in every way lawful and never before questioned, and has proved of incalculable benefit to the commercial interests of the whole country.

Permit us to call your attention to the peculiar wording of this bill, and especially to the bracketed words in the second section, reading as follows: "or unless the articles so contracted to be "sold and delivered shall subsequently be actually delivered to "the purchaser for manufacture or consumption.") In other words, a miller can purchase wheat for delivery from anyone who wishes to sell, whether he has it in hand or not, without the tax being operative on either party, provided it is delivered to the said miller for manufacture. A merchant or exporter cannot make such a purchase, because he is neither a manufacturer nor a consumer under this law, therefore the man who wishes to sell wheat for future delivery, without incurring the tax, which he has not actually in hand, has only the one class of customers, and they are the privileged millers.

Now please examine the third section and you will notice that while all the products of the hog are made subject to the proposed tax, the product of wheat (flour) is not mentioned. Here again the miller is made the favored son of legislation. This may be the result of accident and not design, but when taken in connection with the fact that the exports of flour from the United States during 1891 amounted to the value of \$64,783,861 and that it was largely dealt in for future delivery, exactly as wheat, corn,

provisions and the other articles mentioned in the bill as subject to tax are, some idea may be formed of the immense advantage the proposed legislation would give to the large milling interest of the Northwest.

For these reasons we think we are justified in characterizing the measure as "hiding a selfish purpose which aims to injure the many for the direct benefit of the few."

Gentlemen, one word more and I have done. The United States is eminently a commercial country, and through her commerce, backed up as it is by agricultural, mineral, mechanical and scientific development, is rapidly becoming the wealthiest of all the countries of the world.

Let me call your attention to this fact, which, while we do not claim it as a result, we have a right to say of it that it is a coincidence. Buying and selling for future delivery (although always more or less operated as now carried on) became the rule with the American merchant about the year 1875. Since that period (because of its protective element) it has been adopted by every European country with whom we trade, and it is found to give every satisfaction. For the seventeen years prior to 1875 the balance of trade *against* this country aggregated in round numbers \$1,200,000,000. Since that period, which is also seventeen years, the balance of trade *in favor* of this country aggregates in round numbers the enormous sum of \$1,825,000,000, of which amount \$155,500,000 was for the year 1891. Do not these figures speak volumes for the men who hold the helm of commercial enterprise in the United States, and are not their views on commercial subjects entitled to consideration and respect?

We do not come here as suppliants, but ask for, in the firm hope of receiving, recognition for what we have done, and are doing, in forcing the country to the front. There is no egotism in our claim that the American merchant stands out as the central figure in our national development. He is as necessary to the agriculturist in obtaining the largest money value for his labor, as he is to his government to whom he contributes the major part of the revenues which it receives. He is the patron of the railroad, the steamship, and the wonderful discoveries of science, whose inventions he quickly adapts to the more rapid and economic

requirements of his business. He is the friend, and to a great extent the supporter, of the professions and contributes largely to education, literature and the arts and every other refining influence that creates and furthers social happiness. It is consistent, therefore, that we should ask for, and you grant the fostering care of legislation to commercial enterprise, and that the great mercantile associations throughout the land, who are more directly responsible for the outcome and who are continually alive to the changes that are of necessity always taking place, are the best able to detect injurious influences as they arise and to suggest to legislative bodies the needed remedies.

Respectfully submitted in behalf of the

NEW YORK PRODUCE EXCHANGE,

By A. E. ORR.

February 16, 1892.

The following protest against the passage of either bill has been duly presented to Congress:

“NEW YORK, February 4th, 1892.

“*To the Hon. The House of Representatives of the United States:*

“The undersigned, engaged in the banking business in the city of New York, believe that if House of Representatives’ Bill, No. 2699 [the Hatch bill], now before your honorable body, taxing purchases and sales of cotton, grain and hog products for future delivery, becomes a law it will do great damage to the business in those articles, and work a serious injury to producers.

“That, as bankers, we consider our risk in advancing on such property, very much less than was the case prior to the inauguration of the present method of doing business.

“We therefore earnestly protest against the passage of this measure, and trust that no legislation in this direction may be approved by your honorable body.

JAS. T. WOODWARD.....President, Hanover National Bank.

J. EDWARD SIMMONS.....President, Fourth National Bank.

WARNER VAN NORDEN.....President, National Bank of North America.

ARTHUR B. GRAVES.....President, St. Nicholas Bank.

JAMES STILLMAN.....President, National City Bank.

A. E. ORR.....	Vice-Pres. Mechanics' National Bank.
FOREST H. PARKER.....	President, New York Produce Exchange.
CHARLES M. FRY.....	President, Bank of New York, N.B.A.
R. M. GALLAWAY.....	President, Merchants' National Bank.
H. ROCHOLL.....	President, German American Bank.
W. W. FLANNAGAN.....	President, Southern National Bank.
W. A. NASH.....	President, Corn Exchange Bank.
J. H. PARKER.....	President, United States National Bank.
JNO. B. WOODWARD.....	President, Third National Bank.
W. W. SHERMAN.....	President, National Bank of Commerce.
W. H. PERKINS.....	President, Bank of America.
R. L. EDWARDS.....	President, Bank of the State of New York.
E. H. PERKINS, JR.....	President, Importers' and Traders' National Bank.
H. W. CANNON.....	President, Chase National Bank.
J. K. CILLEY.....	President, Ninth National Bank.
D. C. HAYS.....	President, Manhattan Company.
GEORGE BLISS.....	Of Morton, Bliss & Co., Bankers.
LADENBURG, THALMANN & Co.....	Bankers.
KNAUTH, NACHOD & KUHNE.....	Bankers.
LAZARD FRERES.....	Bankers.
BARING, MAGOUN & Co.....	Bankers.
* BROWN BROS. & Co.....	Bankers.
J. & W. SELIGMAN & Co.....	Bankers.
HEIDELBACH, ICKELHEIMER & Co.....	Bankers.
KUHN, LOEB & Co.....	Bankers.
BLAKE BROTHERS & Co.....	Bankers.

*These are the leading dealers in foreign exchange in the city—I might properly say, in the country.—C. A. R.

E.

I append also a third bill which has been appropriately referred.

IN THE SENATE OF THE UNITED STATES, January 5, 1892.

By MR. PEPPER:—A Bill to Protect Interstate Commerce; to Prevent Dealing in "Options" and "Futures;" to Prohibit the Formation of "Trusts," "Combines," "Corners," and all other Combinations which Affect Prices; and to Punish Conspiracies against Freedom of Trade among the People of the Several States.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That corn, wheat, cotton, tobacco, cattle, horses, swine, sheep, beef, pork, mutton, wool, rice, cloth, iron, copper, lead, wood, glass, coffee, tea, sugar, oil, paper, and every other article in common and general use among the people of the several states, whether in crude, natural, or manufactured form, are hereby declared to be articles of interstate commerce, and they may be carried from place to place within the jurisdiction of the United States, and be sold or dealt in without interference, obstruction, or impediment by or on the part of any person, company, corporation, trust, combine, syndicate, corner, business proceeding, or device whatsoever: *Provided*, That in any State where, by the laws thereof, the manufacture or sale of any article or articles is prohibited, such article or articles shall not be carried into such State for sale, nor shall they be sold or otherwise disposed of there in violation of the laws of such State.

SEC. 2. That every willful act, proceeding, agreement, custom, shift, or device, by whatsoever name or title it may be known, which shall have the effect to in any way interfere with the freedom of transit of articles of interstate commerce, or with the freedom of traffic therein, or which shall have the effect to influence prices or values of commodities by raising or lowering them, or which shall in any manner interrupt the lawful and usual course of trade in such commodities, is hereby declared to be a felony, punishable by imprisonment and hard labor for a period of not less than two years, nor more than ten years, in the discretion of the court.

SEC. 3. That every combinations of persons, partnerships, companies, or corporations engaged in the same or similar lines of business entered into for the purpose of controlling or regulating prices of articles of interstate commerce, or which shall have that effect; every agreement, contract, or arrangement by, between, or among such persons, partnerships, companies, or corporations, whereby one or more of the parties thereto shall agree, promise or stipulate, expressly or impliedly, directly or indirectly, to temporarily close his, her, or their business, or shall in such manner agree or promise to go out of business, the object or purpose of such agreement, promise, or stipulation being to prevent competition in the particular business, and thus enable the other party or parties to such agreement or stipulation to regulate, control, or influence market prices of the article or articles, raised, produced, manufactured, or dealt in by the parties interested in such arrangement, is hereby declared to be a felony, punishable by imprisonment and hard labor for a period not less than two years, nor more than ten years, in the discretion of the court.

SEC. 4. That all dealings, trades, contracts, agreements, stipulations, promises, proceedings, and devices voluntarily entered into, practiced, used, applied, or adopted for the purpose of collecting and storing any article or articles of interstate commerce with intent to raise or lower market prices or values of such articles, or which shall have that effect, and all proceedings and acts commonly designated "corners," and all dealings in options and futures, and all trading, dealing, or proceeding of that nature, and having like effect, are hereby declared to be felonies, punishable by imprisonment and hard labor for a period not less than two years nor more than ten years, in the discretion of the court.

SEC. 5. That for the purposes of this Act the word "options" shall be understood to mean any contract or agreement whereby a party thereto, or for any party for whom or in whose behalf such contract or agreement is made, acquires the right or privilege, but is not thereby obligated, to deliver to another at a future time or period any of the articles mentioned in section one of this Act.

SEC. 6. That for the purpose of this Act the word "futures" shall be understood to mean any contract or agreement whereby

a party agrees to sell and deliver at a future time to another any of the articles mentioned in section one of this Act, when at the time of making such contract or agreement the party so agreeing to make such delivery, or the party for whom he acts as agent, broker, or employé in making such contract or agreement, is not at the time of making the same the owner of the article so contracted and agreed to be delivered.

SEC. 7. That district courts of the United States shall have jurisdiction in all cases provided for by this Act; the provisions hereof shall be specially given in charge to the grand jury at every term, and, under proper instructions of the court, touching the scope and object of the law, the jury shall determine, as matter of fact, in every case brought under the provisions hereof, whether the testimony adduced on the trial brings the case within the intent of the law, and whether it proves the person or persons charged in the indictment to be guilty of a violation of the law. The indictment may be amended at any stage of the trial or proceedings to conform to the facts proved, but the defendant shall be allowed time and opportunity to answer anything substantially new or different which the amendment charges.

SEC. 8. That in all cases of violation of the provisions of this Act by partnerships, companies, corporations, syndicates, or other combinations of persons under particular names, titles, or designations, the person or persons managing or conducting the business, proceeding, or device of such partnerships, companies, corporations, syndicates, or other combinations so violating the law, and all agents, attorneys, and employés thereof knowingly assisting in the management or conduct of such business or device, shall be held amenable to the provisions hereof, and tried and punished accordingly.

SEC. 9. That this Act shall take effect and be in force on and after the first day of the second calendar month next after its passage.

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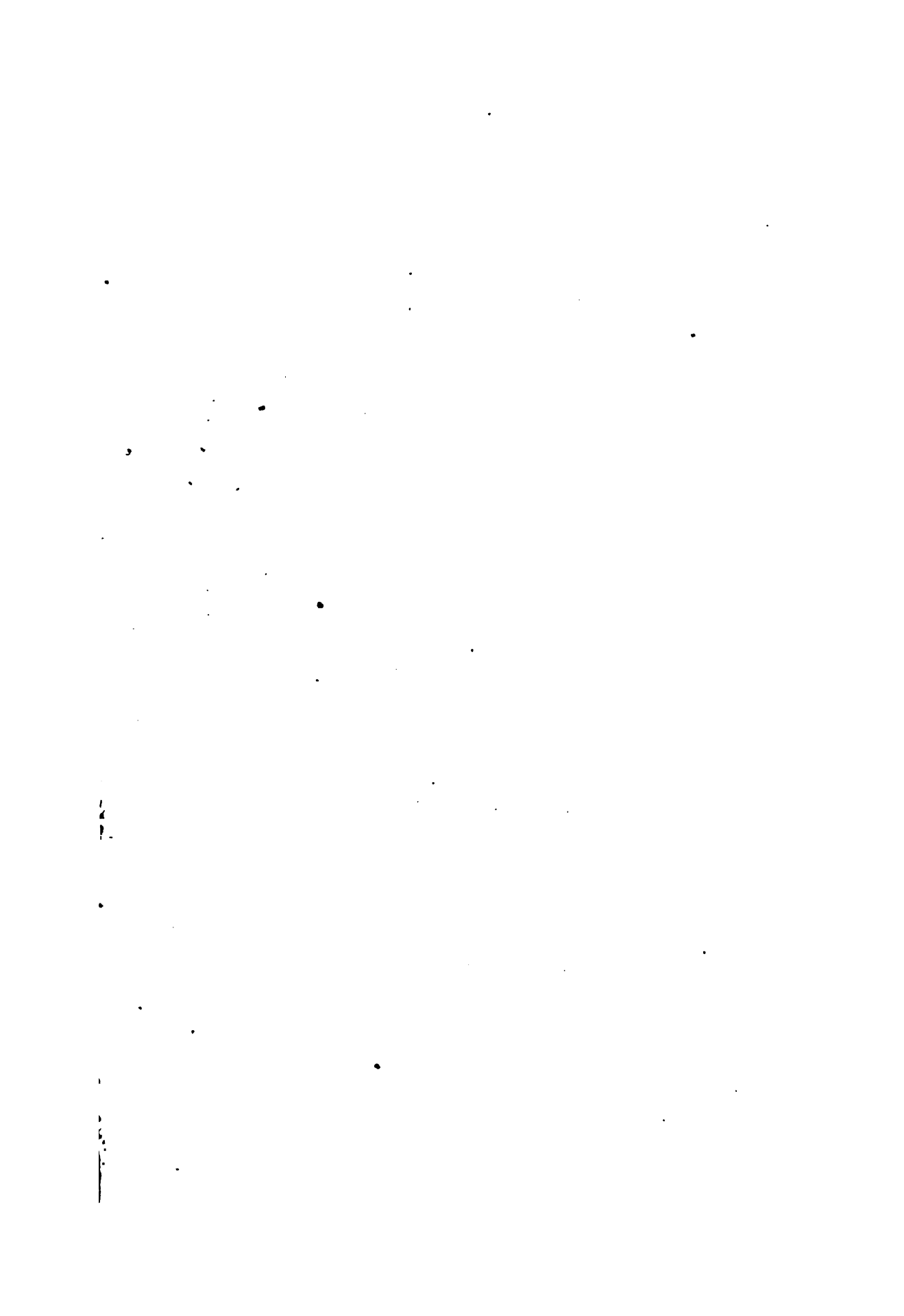
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